6 Reparations in the aftermath of repression and mass violence

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It is a basic maxim of law that harms should be remedied. Every legal system insists on it, in some form. Under international law, states are obliged to provide remedies for violations of human rights, both as a matter of treaty law and as part of the general rules of state responsibility. Recent United Nations (UN) formulations view restitution, rehabilitation, and compensation as interlinked but distinct state obligations.[1] Not only states must remedy past harms: the statute of the newly created International Criminal Court allows for individual offenders to pay reparations to victims, as well as for the creation of a trust fund to be used where individual awards are impracticable.

Despite these remedies, few reparations have actually been paid to victims of war crimes and human rights abuses in the wake of mass violence. So far, Germany has paid the largest reparations (for Nazi-era crimes). The United States paid reparations to surviving Japanese-American internees, but other claims from the Second World War, like those against Japan for "comfort women" and slave laborers, have fared less well. Outside the context of the Second World War, examples of large-scale reparations programs become scarcer. Chile and Argentina provided compensation, rehabilitation, and services to some (but not all) of the victims of their respective military dictatorships. The UN set up a compensation mechanism for victims of Iraq's invasion of Kuwait, some of whom suffered what could be characterized as violations of human rights. The International Criminal Tribunal for the former Yugoslavia (ICTY) allows victims to pursue compensation claims in their national courts. Truth commissions in South Africa, Guatemala, El Salvador, and Panama have recommended reparations programs, but to date the governments of those countries have been slow to act on their proposals. The Rwandan government has an elaborate plan for reparations for victims of the 1994 genocide, but it is too soon to tell if the process will work effectively.

Why the discrepancy between word and deed? If reparations are so universally accepted as part of a state's human rights obligations, why have

so few states emerging from periods of armed conflict or mass violence put viable programs into place? In this chapter I consider some of the difficulties in thinking about reparations in the wake of genocide and other forms of mass violence, both in general and in the context of poor countries where there may be many victims and multiple claims on scarce resources. I also examine past practices for ideas and insights that might be applicable in the context of mass violence. In a final section, I propose three distinct yet interrelated ways of thinking about reparations, all of which eschew the classic view of individual, court-ordered reparations in favor of more community-oriented, flexible approaches.

Defining reparations

There is a basic paradox at the heart of the idea of reparations: they are intended to return victims to the state they would have been in had the violations not occurred – something that it is impossible to do. They are also supposed to be the physical embodiment of a society's recognition of, and remorse and atonement for, harms inflicted. This view of reparations emerges both from the law of civil wrongs and from the law and jurisprudence around state responsibility for wrongs done, at least initially, to other states. But what could replace lost health and serenity, the loss of a loved one or of a whole extended family, a generation of friends, the destruction of culture or an entire community?

Reparations serve multiple functions. They are both backward- and forward-looking. They aim to recompense for loss and to restore the good name of those defamed, but also to reintegrate the marginalized and isolated into society so that they can contribute to the future rebuilding of the country. Reparations can be both moral and material. Material reparations for an individual victim can include restitution of lost or stolen property, a job, a pension, or a person's good name. If needed, they can provide rehabilitative services to victims, including medical, psychiatric or occupational therapies. They can encompass monetary compensation in the form of a one-time payment, a pension, or a package of services for victims and survivors. For collectivities such as a village or religious community, restitution can include restitution of cultural or religious property, communal lands, and education and health facilities, and compensation in the form of money or services to the community.

History has shown that moral reparations are essential for victims and, in some cases, more important than material ones. They can encompass the disclosure of the facts of a victim's mistreatment or a loved one's death, and the public naming of those responsible for these crimes. They can include official apologies and acknowledgment of wrongdoing and, most importantly for many victims, judicial proceedings or administrative procedures, including the removal of perpetrators from positions of power.

Moral reparations can be as fundamental as the exhumation and identification of the remains of victims, and assistance in reburials and mourning ceremonies. They can have a collective aspect, including public memorials, days of remembrance, parks or other public monuments, renaming of streets or schools, preservation of repressive sites as museums, or other ways of creating public memory. Reform of education, re-writing of history texts, and education in human rights and tolerance embrace the notion of reparations. However, there is a danger that such moral reparations can be used politically to stigmatize and marginalize those groups whose members perpetrated the abuse. Reparations must be offered in ways that acknowledge the suffering of victims but do not victimize others who did not actively engage in the violence.

Modalities of reparations

Reparations to victims can come about through complaints filed in the courts, or through specially designed administrative schemes. Most reparations programs have elements of both approaches. In a number of cases, settlements of court cases have included or have triggered administrative compensation schemes. In addition to national courts, which hear claims based on acts committed in the victim's home country and, occasionally, abroad, regional courts in Europe and the Americas have assessed damages against states, and friendly settlements of cases before regional bodies have sometimes provided for individual reparations.

Court-based mechanisms function best when the plaintiffs are single individuals or, at most, small numbers of victims. In situations where large numbers of people were affected but only a few sue, a few victims can receive large amounts of compensation while others, similarly situated, receive nothing because they never filed claims. Better-educated, middle-class victims often have greater access to courts than those in the lower echelons of society. Court procedure often can be protracted or obscure, or seem to favor defendants. Judgments may be hard to collect. Moreover, individual reparations may fail to capture the collective element of the harm in situations of mass conflict or repression. In counter-insurgencies and civil conflicts, those who plan and carry out atrocities often target specific communities in an effort to end the community's support for rebels, to disperse any organized opposition, or to force the population to flee. Military forces may seek to make local civilians complicit in atrocities, forcing them to watch or even to participate in the violations of their

families' or neighbors' basic human rights. These harms to community life and trust cannot easily be redressed through individual awards. For all these reasons, access to courts, national or regional, will be insufficient in most cases of mass violence.

Few governments have instituted administrative schemes to pay reparations to victims and survivors of massive violations of human rights. In general, existing reparations programs have involved relatively well-off countries, or those where there is a limited and easily identifiable set of victims. They also have involved abuses committed by state security forces against a largely unarmed opposition, such as those in the Southern Cone of South America or Eastern Europe.

German reparations to the victims of the Holocaust have served as the model for subsequent reparations programs. Claimants who could prove they had survived a concentration camp received a lump sum for deprivation of liberty, while another lump sum went to a coordinating body of Jewish organizations for the settlement of Jewish victims living outside Israel.[2] Compensatable categories of harm included loss of life, damage to health, and loss of liberty. Despite the billion-dollar sums involved, many victims remained unsatisfied with the German effort. The administrative procedure was intimidating and degrading, officials tried to weed out claims rather than support victims, and professionals were treated far better than ordinary workers. Retraumatization and a sense of injustice followed, and the lesson that design and attitude matter carried forward to more recent reparations efforts.

In the wake of military dictatorships during the 1970s and 1980s in Chile, Argentina, and Brazil, the newly elected civilian governments of those countries agreed to institute reparations programs for victims of the human rights abuses of the dictatorship. The scale of the programs, like the scale of the repression, differed greatly from one country to the next. For example, following the 1973 military coup in Chile, security forces killed some 3,000 people, and over 1,000 disappeared. The Chilean Congress agreed to provide a lump-sum payment equal to a year's pension, and a monthly pension, based on the average wage, for the spouses, parents, and children of those killed or disappeared. Scholarships for the children of those killed or disappeared, and free medical and psychological care were also available. Argentina compensated political prisoners and the families of the over 10,000 disappeared, and created a legal figure of "absent due to forced disappearance" which allowed the families of the disappeared to remarry or claim inheritance rights without having to concede that the disappeared person was dead.[3] In addition, both Chile and Argentina have provided some degree of moral reparations, including official acknowledgment and public memorials.

In the 1980s, several Eastern European countries established compensation for those killed or imprisoned under Communist regimes. Meanwhile, South Africa's Truth and Reconciliation Commission (TRC), formed to investigate gross human rights violations during the years of *apartheid* rule, recommended payment of some R50 million (approximately US $8 million at the current exchange rate) to 18,000 people as immediate interim reparations, and individual reparation grants of about US $3,500 a year for six years to victims, an amount the commission considered "sufficient to make a meaningful and substantial impact on the quality of [victims'] lives."[4] It also recommended provision of medical and psychological care, fulfillment of significant personal and community needs (like health care, mental health facilities, education and housing, and headstones for graves), and symbolic reparations.

Truth commissions in El Salvador and Guatemala recommended a range of reparatory measures, few of which have been carried out. The Salvadoran Truth Commission, made up entirely of non-Salvadorans, called for the creation of a Special Fund, financed by government and international aid funds, to pay compensation to victims. It also recommended moral reparations and a follow-up body to monitor compliance with the recommendations. In Guatemala, the UN-backed Commission on Historical Clarification (CHC) called for official acknowledgment, construction of parks and monuments, naming public buildings after victims, a day of remembrance, and restoration of Mayan sacred sites. It also recommended a National Reparation Program, to include restitution of material possessions, especially land; compensation for the "most serious injuries and losses"; psychosocial rehabilitation; and moral and symbolic reparations. However, neither of the parties to the conflict has expressed much interest in carrying out these recommendations.[5]

Administrative reparations also can include restitution of land and property. In Bosnia and Herzegovina, the Dayton Peace Agreement included provisions delegalizing transfers of property made under threat or duress or otherwise connected to ethnic cleansing, and created a special Commission on Real Property Claims to provide restitution or compensate citizens who lost land and property during the 1992–1995 war. In South Africa, the government established Land Claims Courts. Under the South African Restitution Act, plaintiffs must show that they are communities or individuals who themselves or through their forebears had land rights of which they were dispossessed after June 19, 1913 by racially discriminatory laws or practices. The difficulties of proving land rights that go back generations and where land was often held communally and without written title are formidable, and the Land Claims Courts have used testimony from historians and anthropologists, as well

as local elders, to substantiate claims. Remedies can include full ownership, partial rights to the land, rights to equivalent land, or compensation. The present landowners are compensated by the state at market value.[6]

Another compensatory mechanism is the creation of trust funds at a national or international level. In the wake of Iraq's invasion of Kuwait in 1990, the UN established a Compensation Commission to provide reparations to foreign governments, corporations, and individuals injured by Iraq's actions. The compensation comes from sales of a fixed percentage of Iraqi oil, held in a fund. The UN has a number of trust funds, including one for victims of torture. Sierra Leone set up a Special Fund for Victims, which it hopes to finance through international donations.

These compensation schemes share a number of vexing problems. First, and perhaps most difficult, is defining who is a "victim." At least in three countries, the results have not been very satisfying. In Chile, the government decided to focus solely on those killed and disappeared by the security forces, leaving aside the vastly larger number of those who were tortured while in detention and survived, and those who were forced into exile. While justified as a way to spend limited funds on the "worst" violations, the effect was to infuriate survivors, who read this as a lack of recognition of the severity of their own suffering and an attempt to paper over the extent of the crimes.[7] In South Africa, the TRC defined "victims" as those who suffered from the gross violations – killing, torture, abduction – prohibited under South African and international law. Critics pointed out that this limited mandate excluded the legal pillars of *apartheid*: forced removals, pass laws, residential segregation, and other forms of racial discrimination and detention without trial.[8] By doing so, it shifted the focus from complicity in and the benefits of *apartheid* as regards whites as a group to the misdeeds of a smaller group of security force operatives, easily characterized as "bad apples." In this case, individual guilt promoted a myth of collective innocence for the beneficiaries of the *apartheid* system. Finally, in Guatemala, members of the paramilitary Civil Self-Defense Patrols ((PACs), who were used as human shields and to do the military's dirty work, claimed compensation for their unpaid government service. The government agreed to pay each PAC member some Q5,000 (US $675), while reparations for civilian victims of war crimes languished. In all three cases, the identification of "victimhood" has been highly contested.

The range of reparatory measures may also be open to debate. The largest study to actually interview victims was carried out by the Chilean human rights organization CODEPU under the auspices of the Association for the Prevention of Torture. The study interviewed about 100 individuals and groups of family members of disappeared and summarily executed victims in Chile, Argentina, El Salvador, and Guatemala (it relied on secondary research for a section on South Africa). The study emphasized that, for the victims, moral and legal measures of reparation are fundamental, while monetary compensation is controversial and problematic. One striking finding of the CODEPU study is the emphasis that survivors placed on education for the children of those killed.[9]

Why collective reparations?

In recent years, episodes of genocide and mass violence involving the deaths of tens or even hundreds of thousands of people usually have taken place in poor countries with scarce resources. Often they follow or coincide with a civil conflict that has devastated the country's infrastructure and displaced large segments of the population. In these situations, individualized monetary reparations are difficult to imagine without a substantial financial commitment from the international community.

Because the number of victims is so large, episodes of mass violence can exacerbate the limitations of individual reparations schemes. Reparations through courts or administrative compensation schemes require a generally functioning system, not one suffering massive breakdowns in every facet of life and governance. Moreover, in mass conflicts, the collective nature of the harm becomes more salient. Where there is attempted genocide, the harm is defined in terms of an attempt to destroy a group, and so reparation should be similarly defined. Genocidal (or large-scale political conflicts) often have been characterized by the displacement and destruction of whole communities, the setting of neighbor against neighbor, the breeding of forced complicity, and of atomization and distrust. In such situations the lines between victim, bystander, accomplice, and perpetrator are often blurred.

By and large, courts have been reluctant to award collective reparations in the wake of mass violence, and in any case have found themselves ill-equipped to do so. For example, the International Criminal Tribunal for Rwanda (ICTR), through the Office of the Registrar, attempted at one point to provide minimal support for witnesses coming before the tribunal. In September 2000, the Registrar's office launched an initiative to provide legal advice, psychological counseling, physical therapy, and monetary assistance to the Taba Township. In this locality, where the mayor had been convicted of genocide, there were hundreds of survivors, most of them destitute women. However, the tribunal soon found that the needs far exceeded its capacity, that it was ill-equipped to design and administer reparations schemes, and that to do so adequately would require amendment of the tribunal's statute and rules. The effort was

scaled back, although the judges and prosecutor agreed that the UN Security Council should amend the tribunal's statute to allow it a greater role in compensation.[10] This dilemma raises the important question of whether an international court should differ in its responsibilities to victims and their communities from domestic courts, where collective harm is usually minimal (see also Stover, Chapter 5, and Fletcher and Weinstein, Chapter 1, in this volume).

Court-based mechanisms tend to function most effectively for individual litigants or small groups. Nevertheless, the Inter-American Court of Human Rights (IACHR or the Court) has taken some steps in a number of cases to use the court system to award collective reparations. In one case involving summary executions in Suriname, the IACHR awarded collective reparations by ordering the construction of a school and medical dispensary as part of a formal judgment, while denying monetary compensation to the affected community as a collective.[11] In a massacre case in Guatemala, the parties agreed on collective as well as individual reparations, to be decided by a community consultation process.[12] In each of these cases the limitations of court-based procedures for granting collective awards is apparent: only a relatively small number of actual victims were involved in either case, and significant amounts of time passed between the violation and the reparations settlement or judgment.

The most comprehensive collective reparations program has been the German payments to Jewish organizations and to the State of Israel following the Holocaust. Jewish organizations asked for collective reparations to compensate for the damage caused to the "very fabric of the Jewish people's existence," including the loss of life, destruction of property, and suffering of those with no living heirs or dependants.[13] Germany eventually paid a total of approximately US $824 million to Israel for acts against the Jewish people, in addition to substantial amounts of compensation to other European states, and to individual victims and survivors.

Other group claims relating to the Second World War have fared less well. For example, after decades of silence, Asian "comfort women" began in the late 1980s to organize to seek redress for their sexual enslavement by the Japanese army during the war. The women unsuccessfully sought official acknowledgment and apologies, a memorial, compensation for survivors and their families, and changes in the teaching of history in Japanese schools. In 1991, one woman, Kim Hak Sun, filed suit against the Japanese government. While the government refused to provide individual compensation, it did attempt a form of collective reparations. Eventually, an Asian Women's Fund (AWF) was established through private donations to improve the livelihoods of the women. Some survivors have criticized this approach as being based on socio-economic need rather

than on moral restitution. They have held out for individual reparations fully funded by the government and accompanied by a formal apology from the Diet (Japanese Parliament).[14] The Japanese government's resistance to collective reparations may reflect on-going denial of responsibility for the actions of Japan during the Second World War, covert racism, or a reflection of the role of women in Japanese society. Whatever the explanation, this kind of governmental resistance sends a message that the wrong has not been acknowledged; the victims are not likely to feel relief and are revictimized.

Modalities of collective reparations

Collective reparations in the wake of mass violence can fit into three broadly defined and overlapping models: reparations as community development, reparations as community-level acknowledgment and atonement, and reparations as preferential access. I will explore the advantages and complications of each in turn.

Community development

Communities affected by mass violence are usually poor. In some cases, the key underlying causes of the violence have been poverty and inequality. In these situations, widespread destruction of property, crops, infrastructure, and services only exacerbates poverty. Women and children are particularly vulnerable and often are the majority of victims. In some countries, property and inheritance laws that disfavor women may leave widows landless. Economic development at the community level is thus a sorely needed commodity.

Community development as a form of reparation can have several benefits. Projects, such as the construction of schools and community centers, can provide recognition of the wrong done to a community as a whole and give members of divided communities a focus around which to begin rebuilding the fragile ties among neighbors stretched or broken during the conflict. It is essential, however, that the beneficiaries themselves participate in defining the priorities and design of such projects.[15]

The most attractive feature of linking collective reparations with local development is that it avoids the dilemma of choosing between reparations and other, equally pressing, spending priorities like water or housing. The South African government, for example, justified the small size of its proposed individual reparations grants for victims of *apartheid*-era abuses by arguing that the overall goal of fundamental social

transformation is paramount, and that the TRC's reparations proposals could only be accommodated within that larger goal.[16]

Reparation as a form of development has a number of drawbacks. First, it conflates two separate obligations of government: to make reparation for wrongs and to provide essential services to the population. Why should governments, which are obligated to improve the well-being of their citizenry, be allowed to slap a "reparations" label on a development project and get off cheaply? Human rights groups have objected to this conflation of obligations as an abdication of a state's legal obligation to respond to past injustices.

Second, it is often impossible to appropriately target development projects as reparations to the victims and survivors. Where the country is ethnically or politically divided along geographic lines, it may be possible to funnel development aid and projects to the hardest-hit areas, where most victims and survivors reside. Doing so may foster new resentments over perceived favoritism, however. The development of new infrastructure and services may even tend to disproportionately favor those with the economic and social power to take most advantage. In countries like Rwanda, where Hutu and Tutsi live intertwined, services and infrastructure cannot feasibly be reserved to the "victim" group, and so development projects framed as reparations are of equal benefit to victims, bystanders, and even, at times, perpetrators. The Guatemalan Truth Commission recognized this conundrum and advised in its report that:

> Collective reparatory measures for survivors of collective human rights violations and acts of violence, and their relatives, should be carried out within a framework of territorially based projects to promote reconciliation, so that in addition to addressing reparation, their other actions and benefits also favor the entire population, without distinction between victims and perpetrators.[17]

Depending upon the country's unique characteristics, the nature of the conflict, and the structure of the post-conflict government and of other development efforts, collective reparations must carefully consider the balance between acknowledging the special claims of some and avoiding the creation of new inequalities and resentments.

Finally, the "reparations as community development" paradigm can potentially negate or underrate the moral or symbolic elements of reparations, which studies have shown are the most important for victims.[18] Governments could add a commemorative element to their provision of basic services, such as naming a new school or health center after victims, combining the road opening with a monument. But this has to be done conscientiously, and the project has to be framed not just as development

but also as redress. This is particularly important in rural areas where such projects, although no substitute for individualized reparations, may be the best that can be expected.

One of the obstacles to pursuing a "reparations as community development" framework is the differing mandates, cultures, and conceptualization of goals that exist among the various institutions usually involved in post-conflict reconstruction and development. On one side are human rights and survivors' organizations that often view reparations and accountability for past crimes as a priority. Even here, our studies (see Biro et al. Chapter 9 and Longman et al. Chapter 10 in this volume), suggest that the relationship between trauma and justice is not straightforward. On the other side are governments, which may wish to avoid dredging up old animosities, and international development agencies, which wish not to become bogged down in political issues.

These two visions have moved closer together in recent years, as the UN Development Programme (UNDP) and the World Bank, as well as major European, Canadian, and US development agencies, have realized the need for a more comprehensive approach to their post-conflict interventions. The UNDP, the World Bank, and national development agencies such as the United States Agency for International Development (USAID) now have specific units or bureaus devoted to post-conflict recovery and reconstruction. The UNDP's list of recovery priorities includes "reduction of conflict and promotion of reconciliation," while the World Bank's human rights manifesto lists "victims of war and violence" as among the vulnerable groups most needing protection.[19] The integration of post-conflict reconstruction and collective reparations seems, therefore, promising. However, difficulties persist based on differences in vocabulary, professional biases, restrictive mandates, and ease of goals. Neither the UNDP nor the World Bank frames issues in terms of justice or dealing with legacies of the past, but rather in terms of repair and economic growth. In part, this may be due to the predominance of lawyers in framing reparations issues, and the predominance of economists and engineers in the development assistance world. Post-conflict work also involves merging the different perspectives of conflict management, humanitarian assistance, human rights monitoring, and traditional development cultures, each with its own "turf," time frame and policy prescriptions. Development aid involves different, often shorter-term, and more measurable goals. As a World Bank report stated in 1998: "It is easier to rebuild roads and bridges than it is to reconstruct institutions and strengthen the social fabric of a society."[20] It is also easier to quantify payback periods and break-even points in the former enterprise than the latter.

A reparations perspective, especially if politically sensitive, might also be considered interference in the political affairs of a state, which is prohibited by the World Bank's Articles of Agreement.[21] To the extent that identified victims and all local residents benefit from projects, this problem would be mitigated. The World Bank has come a long way toward recognizing human rights, considering "rights-based" approaches to its work, and incorporating demobilization of former combatants and reintegration of displaced groups into its mandate.[22] However, the kind of market-opening, social-service-restricting, large project development often espoused by agencies like the World Bank and the International Monetary Fund (IMF) may actually run counter to the local-level, service-providing, participatory focus of a reparations policy. Development strategies such as micro lending and small grants seem better suited to integrating development into a reparations perspective – and reparations into a development plan.

Community-level acknowledgment and service

Collective reparations in the aftermath of genocide and other forms of mass violence form only a small part of a larger agenda for social reconstruction. That agenda, explored in the rest of this volume, includes such mechanisms as prosecutions; disclosure of the nature, pattern, extent, and consequences of abuses through various approaches; removal of those responsible for past crimes from positions of public trust; psychosocial interventions; education reform; refugee returns; community-building; and commemoration.

In a number of post-conflict countries – Rwanda, East Timor, Sierra Leone – the new governments have turned to quasi-traditional mechanisms to provide some measure of justice while fostering the reintegration of low-level offenders into local communities. Although discussed mainly in terms of punishment, such quasi-traditional mechanisms have a clear reparatory element, one which should be further emphasized and developed. For example, in Rwanda (as described by Karekezi et al. in Chapter 3 in this volume), the post-genocide government opted to revive the gacaca system of traditional justice. The courts consist of some tens of thousands of elected lay judges who hear testimony from assembled villagers on the participation of suspects in genocide, and may sentence them to jail time or, in the case of property crimes, to compensatory payments. The primary emphasis is on restoring some of the damage done to the community, but the public hearings also allow for truth-telling; confrontation of victims and accused; and opportunities for acts of contrition and apology on the part of perpetrators and bystanders; and, when

possible, acceptance by victims. During the public village hearing, civil claimants can make their case for compensation, and the accused, or others, can present arguments against the civil claim.[23] The gacaca judges compile a list of victims who suffered material losses or bodily harm, and create an inventory (including an amount) of losses according to a schedule set out by law. This list is to be forwarded to a compensation fund, which will be in charge of implementation. The compensation fund is to be financed by a combination of state funds, voluntary foreign contributions, reparations taken from individual offenders tried in the domestic courts, and profit from community service works. Because the amounts awarded by thousands of gacaca courts may well exceed the amount collected for the fund, the fund's board can draw up a scale of payments, and payments may be made in decreasing installments.[24]

If the suspect (except for leaders and organizers) confesses, half the sentence may be converted to a community service order; for lesser (Category 3) offenders the whole sentence may be replaced by community service. A draft decree on community service would create "Committees for Community Service" which will place prisoners in host institutions. Community service may involve rebuilding destroyed schools, houses, or clinics, maintenance work on buildings, roads, or gardens, crop cultivation to feed the prison population, educational and motivational activities, first aid, or personal care. Thus, a form of collective reparation would replace punishment. Ideally, this will be of benefit both to victims and perpetrators, and thus encourage the social reconstruction of community life.

However, there are a few potential drawbacks: while the labor may be free, many building and maintenance materials still have to come from somewhere, and it is unclear whether adequate state resources will be available. In addition, community service by mostly Hutu offenders may reawaken memories of old injustices, when Belgian colonialists imposed forced labor "uburetwa" on the mostly Hutu peasantry.[25] It is unclear whether enough judges with clean hands or witnesses can be found or, as Karekezi and colleagues describe, that the population will be willing to participate in a process that can be time-consuming and take years to complete. Finally, the gacaca courts do not have a mandate to examine crimes committed by the Rwandan Patriotic Front (RPF); this leaves victims of RPF abuses unrecognized and unacknowledged (see Des Forges and Longman, Chapter 2 in this volume).

A traditional approach to reparations has also been undertaken in East Timor, where widespread looting and burning, along with murder and rape, accompanied the 1999 rampage of pro-Indonesia militias, a culmination of years of repressive acts and human rights violations by the

Indonesian military following its 1974 annexation of the island nation. After the violence ended, a national Commission for Reception, Truth, and Reconciliation was formed to assist in reconciliation. The Commission has the normal truth-seeking, statement-taking, and report-writing functions, but it contains a significant innovation. Those who committed less serious crimes (theft, minor assault, house-burning, stealing or destroying crops or animals) may approach the Commission and ask it to convene a meeting with victims and local community members. These parties are to discuss the crimes and propose an agreement whereby the perpetrator agrees to undertake some form of community service, including community work, a repayment or public apology, or to undertake some other "act of reconciliation." Once this process is completed, the District Court is to enter an order that those acts cannot be prosecuted or be subject to civil liability in the future, and the community is to agree that the perpetrator may return home without fear. Failure to fulfill the agreement is itself a criminal offense punishable by up to one year's imprisonment and/or a fine, while failure to apply to the Commission process leaves the offender at risk of future prosecution. Serious crimes, including rape, murder, organizing or planning crimes, and crimes against humanity are dealt with separately by a Serious Criminal Offenses Panel.[26]

The hearings have been ceremonial affairs making extensive use of traditional symbols and rituals, including traditional law-givers. Before a panel of community elders and the assembled village, including the victims, those seeking reintegration tell their story and respond to questions. Victims then are able to respond, the public can contribute additional information about the deponents, and negotiations ensue over appropriate reparatory acts. In the hearings to date, these have ranged from a formal apology, to payment in livestock, traditional fabric, coins, and liquor. In a few cases, the accused have agreed to work repairing a school (together with the victim after he volunteered to help) or building a church. According to one observer, "[d]eeply embedded in the strong local culture and custom, community members affirmed that this process had real meaning for their lives – that it was important for them to publicly acknowledge what had happened in the community and to deal with the rift that had divided them."[27]

These types of local-level community reconciliation program might prove an effective form of reparation where there are many low-level perpetrators, where victims and perpetrators (and everyone in between) must coexist, and where neither the state nor the perpetrators have the resources to pay monetary compensation. These approaches emphasize moral reparations to the community as a whole, a recognition that wrong was done both to individual victims and to the fabric of community life.

Other attractive features include the perpetrators' public recognition and atonement for their wrongs, and the involvement of the whole community in the process of hearing and challenging the defendant/deponents' story, and in the ultimate resolution and reintegration of all concerned. These efforts allow victims to confront those who harmed them, and encourage apologies and atonement. They also are able to reflect and affirm local cultural traditions and values, and can be tailored to the specific dynamics of each culture.

And yet, to date, the primary focus has been not on reparations but on punishment (Rwanda) and reconciliation (East Timor). There is the danger that issues of reparation could be short-changed, and that victims could feel pressured not to demand too much from perpetrators in order not to interfere with community reconciliation. Community reparations programs like these will also work well only where there is a sense that the higher-ups who perpetrated the violence are being adequately dealt with elsewhere. Finally, there may be certain cultural preconditions for such programs. In rural societies like East Timor, for example, community unity and harmony may be more salient values than, say, in cities in Bosnia or in Latin America. Cultural determinants may condition these kinds of community service/reconciliation program.

Preferential access

A third way of thinking about reparations after genocide or mass violence is the provision of preferential access to services and public goods to victims: a "go-to-the-head-of-the-line" approach. From a position of ostracism and marginalization, the victims' status as worthy members of society is restored and acknowledged, through priority access to government services such as state-subsidized or state-built housing, education, public transportation passes, and the like.

Most countries provide their war veterans with preferential access to certain state benefits. It takes only a small leap of the imagination to analogize the risks and burdens borne by veterans with those borne by victims of state repression or targeted by *génocidaires*. Like veterans, victims of mass atrocity have made extraordinary sacrifices; they arguably deserve a privileged place in rebuilding society. Indeed, in the Gorbachev-era Soviet Union, many cities awarded survivors of the Gulag the privileges enjoyed by veterans, including the right to shop in special stores, free passage on local transport, and priority access to better housing and medical care.[28]

The approach in practice may not differ much from a "reparations as development" paradigm, but the underlying rationale is focused on repairing individual harms and on foregrounding recognition that society

owes a debt to victims. It also allows an emphasis on the educational and health benefits that victims and survivors seem to value most highly, with less focus on more controversial monetary compensation. It does not confuse the state's obligation to all inhabitants to provide infrastructure and public services with its separate obligation to remedy past harms to some.

A preferential access approach does, however, entail certain risks and drawbacks. To begin with, if a large enough percentage of the population qualifies as "victims," there may be little point to being moved to the front of a very long line for services. It is also unclear how long such programs should last before the debt is paid, and what kind of administrative apparatus is needed to register the individual's special status. More fundamentally, a preference-based approach can create new resentments and a sense of victimization among those who are not the beneficiaries of preferences. Moreover, in some circumstances, victims may not want to have to publicly identify themselves as such in order to gain access to services. It is hard to imagine, for example, Tutsi victims of the Rwandan genocide wanting to carry any identification giving them preferential access to government services, after identification cards marked with ethnic identity served as death warrants during the 1994 genocide.

Conclusion

States may combine elements of these three approaches to reparations in cases of mass violence. Rwanda's compensation fund, for example, contemplates payment in services as well as cash. One could imagine preferential access to microcredit as a combination approach. Much will depend on the specific culture and the relationships among organized state power, perpetrators, and victims. The use of one or more of these three approaches should keep the focus on inclusion, moral reparation, community-level solutions, and access to necessary resources. A constant under all these approaches is the need to involve the victims and their organizations in discussions about what reparations, like other post-conflict strategies, should look like.

Reparations are also part of a larger, multi-faceted approach to post-conflict justice and social reconstruction, and should be seen within that context. Reparations may be the most tangible and visible expression of both acknowledgment and change, and in that sense an important contributor to reconciliation and social reconstruction. Reparations also serve as a bridge between the notions of reparatory and distributive justice, between the spheres of political/moral life and economic well-being. Much empirical research on the effects of different kinds of reparations

policy on victims, perpetrators, and the larger society remains to be done before we can pinpoint the contribution of reparations to the larger goals of peace, justice, and equity. It will take a good deal of experimentation and flexibility, as well as adherence to the principle that reparations must eventually be provided to victims of mass violence, to find the right approach for each society.

NOTES

1. Sub-Commission on the Protection and Promotion of Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, UN Doc. E/CN.4/2000/62 (18 Jan. 2000) (annex).
2. Kurt Schwerin, "German Compensation for Victims of Nazi Persecution," *Northwestern University Law Review* 67 (1972): 479–527; Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2000), 334–336.
3. Marcelo Sancinetti and Marcelo Ferrante, *El Derecho Penal en la Protección de los Derechos Humanos* (Buenos Aires, Ediciones Hammurabi, 1999), 360–377.
4. South African Truth and Reconciliation Commission, "A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President," available at http://www.doj.gov.za/trc/reparations/summary.htm.
5. Victor Espinoza Cuevas, Maria Luisa Ortiz Rojas, Paz Rojas Baeza, "Comisiones de Verdad: Un Camino Incierto? Estudio Comparativo de Comisiones de la Verdad en Argentina, Chile, El Salvador, Guatemala y Sudáfrica desde las víctimas y las organizaciones de derechos humanos" (Santiago, Chile: CODEPU/APT, 2002), 139. Available at http://www.apt.ch/pub/library/Estudio2.pdf.
6. South Africa Restitution Act, as amended by Land Restitution and Reform Laws Amendment Act 63 of 1997, available on World Wide Web at http://www.polity.org.za/html/govdocs/legislation/1997/act63.pdf.
7. Cuevas, Rojas, and Baeza, "Comisiones de Verdad."
8. Richard A. Wilson, "Justice and Legitimacy in the South African Transition." In Alexandra Barahona de Brito et al., eds. *The Politics of Memory* (Oxford: Oxford University Press, 2001), 207; Mahmood Mamdani, "Reconciliation Without Justice," *Southern African Review of Books* (1996), 45.
9. Cuevas, Rojas, and Baeza, "Comisiones de Verdad."
10. United Nations Security Council, "Letter Dated 14 December 2000 from the Secretary General Addressed to the President of the Security Council," S/2000/1198, December 15, 2000. The ICTY came to similar conclusions – see United Nations Security Council, "Letter Dated 2 November 2000 from the Secretary General Addressed to the President of the Security Council," S/2000/1063, November 2, 2000.
11. Aloeboetoe et al., Judgment of 10 Sept. 1993, 15 Inter-Amer. Ct. H. R. (ser. C) (1994).

12. Report 19/97, Case 11.212, *Juan Chamay Pablo v. Guatemala* (Colotenango case), 13 March 1997.
13. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Baltimore: Johns Hopkins University Press, 2000), 6.
14. K. Parker and J. F. Chew, "The *Jugun Ianfu* ('Comfort Women') System." In R. L. Brooks, ed. *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York and London: NYU Press, 1999), 89.
15. The Guatemalan and South African Truth Commissions recognized the need for community involvement and empowerment. Commission for Historical Clarification, "Memory of Silence: Report of the Commission for Historical Clarification, Conclusions and Recommendations" (Guatemala: Commission for Historical Clarification, 1999), recommendations, para. 11. Available on World Wide Web at http://shr.aaas.org/guatemala/ceh/report/english/recs3.html; Hlengiwe Mkize, "Introductory Notes to the Presentation of the Truth and Reconciliation Commission's Proposed Reparation and Rehabilitation Policies, 23 Oct. 1997." In Brooks, ed. *When Sorry Isn't Enough*, 501.
16. See, eg, Matome Sebelebele, "Mbeki Says No to 'Wealth Tax'," *BuaNews*, April 15, 2003. Available on World Wide Web at http://www.safrica.info/ess_info/sa_glance/constitution/wealthtax.htm.
17. Commission for Historical Clarification, "Memory of Silence."
18. Cuevas, Rojas, and Baeza, "Comisiones de Verdad."
19. The UNDP has a Bureau for Crisis Prevention and Recovery, while the World Bank has a Conflict Prevention and Reconstruction Unit. The US Agency for International Development's Office for Transition Initiatives plays a similar role. See the website on World Wide Web at http://www.undp.org/erd/recovery/recoverypriorities.htm; World Bank, Conflict Prevention and Reconstruction Unit, "Post-Conflict Reconstruction: The Role of the World Bank," available on World Wide Web at http://lnweb18.worldbank.org/ESSD/sdvext.nsf/67ByDocName/FrameworkforWorldBankInvevolvementinPost-ConflictReconstruction/$FILE/pcr-role-of-bank.pdf; World Bank, *Development and Human Rights: The Role of the World Bank* (Washington, D.C.: World Bank, 1998).
20. World Bank, *Development and Human Rights*, 8.
21. See Maurizio Ragazzi, "Role of the World Bank in Conflict-Afflicted Areas," *The American Society of International Law Proceedings* 95 (2001): 240–244.
22. World Bank, *Development Cooperation and Conflict Operational Policy 2.30* (Washington, D.C.: World Bank, 2001), para. 2.
23. Stef Vandeginste, "Victims of Genocide, Crimes Against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation." In John Torpey, ed. *Politics and the Past: On Repairing Historical Injustices* (Lanham, Md.: Rowman and Littlefield, 2003), 249–276.
24. Ibid.
25. Ibid.
26. Information about the Commission and its work can be found on World Wide Web at http://www.easttimor-reconciliation.org.

27. Kieran Dwyer (observer at a November 2002 hearing), "Report on a Community Reconciliation Process in Suco Lela-Ufe, Nitibe, Oecussi on 22 November 2002," reported in Commission for Reception, Truth, and Reconciliation in East Timor, "Update: October–November 2002," available on the World Wide Web at http://www.easttimor-reconciliation.org/Update-OctNov.htm#English.
28. Kathleen Smith, "Destalinization in the Former Soviet Union." In Naomi Roht-Arriaza, ed. *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995), 117.