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Dixon, P. J., Moffett, L., & Rudling, A. (2019). Postconflict reparations. In *Oxford research encyclopedia of international studies* Oxford University Press. <https://doi.org/10.1093/acrefore/9780190846626.013.500>

Published in:
Oxford research encyclopedia of international studies

Document Version:
Peer reviewed version

Queen's University Belfast - Research Portal:
[Link to publication record in Queen's University Belfast Research Portal](#)

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Postconflict Reparations

Peter Dixon, Luke Moffett, Adriana Rudling

Summary

The right of individuals to claim reparations in light of abuses by state and non-state actors is widely recognized in international law and increasingly by states. The earliest models of reparative justice were rooted in notions of redress from private law and based on principles of corrective justice. Through their respective case law, international and regional human rights bodies have developed the jurisprudence on reparations to include broader notions of repair, codified in the United Nations Basic Principles. While reparations programs for victims of grave crimes have been extremely limited in practice, some evidence suggests that they are becoming more frequent and comprehensive in transitions from conflict, drawing on different administrative and legal approaches. For researchers, these trends motivate questions about how such programs diffuse and the roles that legal context and state and non-state actors play in them.

While scholars agree on the importance of reparations for transitions from conflict and authoritarianism, debates remain about the relationship between reparations and justice. These stem from broader disciplinary, methodological, and conceptual debates over the boundaries of transitional justice. Some argue for more expansive notions of repair that are sensitive to local context and priorities, that seek redistribution, that promote transformative ends like reconciliation, and more. Others see reparations, like transitional justice, as fundamentally legal and corrective and caution against overreach. These debates have inspired critical thinking on the role that reparations play in broader transitional and human rights processes. They also motivate questions about what distinguishes reparations – both in form and in impact – from other varieties of international and domestic intervention after conflict, including peacebuilding and development.

For reparations, however, this debate lacks a solid empirical base and has remained largely normative in nature. The limited empirical studies have relied mostly on qualitative assessments of single cases, where it is difficult to ascribe causation, or large-N population surveys, which have relied mainly on top-down indicators, despite substantial literature devoted to the importance of the everyday in victims' experience of transitional justice. There are also divides between researchers who seek state-level effects, those interested in social effects like reconciliation, and those interested in personal processes of healing. For the states and international organizations who design and implement reparations programs, furthermore, the imagined victim who receives and benefits from them occupies a prominent place in rhetoric and practice. Claims about ostensible impact provide legitimacy while also motivating questions about the logic and politics behind such programs.

Keywords: Reparations, Victims, Transitional Justice, Human Rights, Conflict

The Rise of Reparations

Since the World Wars, reparations have become a key instrument in states trying to contend with their past. Alongside this emergent transitional justice approach, the right of individuals to claim reparations in the aftermath of abuses by state and non-state actors is widely

recognized in international law. The earliest models of reparative justice were rooted in notions of redress from private law and based on principles of corrective justice. Through their respective case law, international and regional human rights bodies developed the jurisprudence on reparations to include broader notions of repair, outlined in the 2005 United Nations Basic Principles on Reparations (UN Basic Principles). While reparations programs for victims of grave crimes have been limited in practice, some evidence suggests that they are becoming more frequent and comprehensive in transitions from conflict, drawing on different administrative and legal approaches. For researchers, these trends motivate questions about how such programs diffuse, their impact, and the roles that legal context and state and non-state actors play in them.

For reparations, however, these issues lack a solid empirical base and have remained largely normative in nature. The limited empirical studies have relied mostly on qualitative assessments of single cases, where it is difficult to ascribe causation, or large-N population surveys, which built mainly on top-down indicators, despite substantial literature devoted to the importance of the everyday in victims' experience of transitional justice. There are also divides between researchers who seek state-level effects, those interested in social effects like reconciliation, and those interested in personal processes of healing. For the states and international organizations who design and implement reparations programs, furthermore, the imagined victim who receives and benefits from them occupies a prominent place in rhetoric and practice. Claims about ostensible impact provide legitimacy while also motivating questions about the logic and politics behind such programs.

This chapter is divided into four sections. The first reviews the legal basis of reparations and identifies several of the key legal trends and innovations that have shaped domestic and international reparations programs over the last half-century. Such innovation has not only expanded the reach and range of domestic and international reparations, but it

has also challenged the dominance of the law as the sole lens through which to define them and measure their effectiveness. The second section takes up this challenge, reviewing debates between critical and palliative framings of the boundaries of reparative justice vis-à-vis related post-conflict fields like development, peacebuilding, and humanitarian assistance. The third section further develops critical reparations scholarship through the lens of politics. The politics of reparations reveal key struggles over reparations, including who can lay claim to them, who counts as a legitimate victim, and what role states can and should play in their design, implementation, and financing. Finally, the fourth section takes up the question of reparative impact. Reparations have been limited in practice, as have studies of their effectiveness. There is both a need and significant opportunity for scholars interested in the impact of transitional justice to focus on reparative impact at the individual, meso, and macro levels.

The Legal Basis of Reparations

Reparations originate in their use as compensation to settle private disputes between individuals and states (Shelton, 2015, p. 9). Compensation and restitution of property as a form of corrective justice oblige the wrongdoer to provide goods to return the victim to the original position before the harm (de Greiff, 2006, p. 453). In international law, the use of reparations came into sharper focus with the end of World War I, when the Allies were keen to ensure that Germany and the Central Powers were collectively held responsible for the damage they had caused through their aggressive war.¹ That said, the final reparations bill negotiated between allied states and Germany was based on the feasibility of what could be provided without overly upsetting private ownership or, given the economic ties between

¹ Article 231, Treaty of Versailles, [1919] UKTS 4 (Cmd. 153)

European countries, the economy (Keynes, 2013, p. 69).² A subsequent claim came through the historic case of the Chorzow Factory at the Permanent Court of International Justice (PCIJ), which established that reparation is intended to ‘as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’³ Importantly, the PCIJ found that reparations arise because of a breach of an international obligation.⁴ As such, reparations in legal terms are a form of justice and accountability, aimed at remedying the harmed caused, as far as is possible and feasible, to an injured party by the wrongdoer.

Since the end of World War II, there has been increasing pressure to move away from horizontal state-to-state reparations, to recognize the vertical dimension allowing individuals within a state to sue for civil wrongs and human rights violations they have suffered (Doak, 2011). These reparation claims for gross violations of individuals and groups’ rights rest on domestic law. With Germany paying out \$89 billion to victims and their descendants, the Holocaust reparations program is one of the largest to date (G. Taylor, Schneider, & Kagan, 2009). Furthermore, a range of complicit actors, like banks (Gribetz & Reig, 2009) and train companies (Tamen, 2011), have also had reparations claims made against them.

Although the Allied-run Nuremberg and Tokyo trials had downplayed victims, treating them as symbolic legitimators of elite-driven policies (Bonacker, 2013; Teitel, 2003), individuals gained standing in international law with the advent of human rights treaties. This meant an increasing recognition of the entitlement of individuals to reparations for gross violations of human rights as their right to a remedy (Cançado Trindade, 2011). Nevertheless, the Cold War introduced a break in the development of reparative politics (Wolfe, 2014). Human rights bodies have since developed the right to reparations on a logic of ensuring the

² There were similar concerns after WWII – See Article 14, Treaty of San Francisco 1951. UNTS No.1832.

³ *Germany v Poland*, The Factory at Chorzow (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E. c. XIII, Docket XIV:I Judgment No. 13, 13 September 1928 (‘Chorzow Factory’ case), para.125.

⁴ ‘Chorzow Factory’ case, para. 125.

effectiveness of individuals' rights. At the same time, these same bodies have critiqued the right to reparations because of skepticism regarding the extent to which harm can be undone. Whether it is valuable to return victims to their original position when that entails vulnerability and marginalization, the foundation of their victimization, has also been called into question (Rombouts & Parmentier, 2009).⁵ These bodies have also focused more on understanding the physical, mental, and moral harm suffered by victims and those close to them. The Inter-American Court of Human Rights (IACtHR), for instance, has broadened reparations beyond restitution and compensation, to also include rehabilitation (e.g. specialist health services to victims), satisfaction (e.g. apologies, public recognition of responsibility, renaming streets and schools after victims), and guarantees of non-repetition (e.g. civil oversight of police and military with human rights education).⁶ These measures are intended to be used together aim to alleviate victims' personal harm as well as vindicate them and return their dignity.⁷

Courts have also moved beyond the individual as a rights holder, to engage with a less-Western and individual-centric approach to rights by also recognizing that indigenous and tribal groups have a collective right to reparations (Citroni & Quintana, 2008). This recognition is based on a concept that these groups have their own customs and norms of redress, cosmovision in how they view themselves in and their connection to their environment, and the loss of their traditional way of life that needs to be considered in reparative measures.⁸ This has also seen the IACtHR requiring states to consider marginalized communities in their domestic reparation programs.⁹ Moreover, in order to avoid that

⁵ *Blake v Guatemala*, Reparations, Series C No. 48 (IACtHR, 22 January 1999), paras 42, 50, and 57

⁶ See Principles 19-23, UN Basic Principles

⁷ Case of the "Las Dos Erres" Massacre v. *Guatemala*, para. 226

⁸ See *Aloeboetoe et al. v Suriname*, Reparations and Costs, Series C No. 15 (IACtHR, 10 September 1993); and *Moiwana Community v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (IACtHR, 15 June 2005)

⁹ See *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270

reparations are traded for impunity and that victims are “bought off”, human rights courts have mandated that reparations be combined with other efforts by the state to investigate and prosecute grave violations of human rights, such as disappearances, torture and genocide¹⁰. However, political pressure and concerns of financial feasibility have shaped the IACtHR judgments on reparations to display an increasing deference to the eligibility criteria, amounts and types of reparations referred by domestic reparations programs (Moffett, 2016, p. 161; Sandoval, 2017, p. 3).

With the advent of globalization, transnational criminal organizations, multinational corporations, and the prevalence of non-international armed conflicts, states are no longer the only actors to exert power and violence. The law has struggled to grapple with this diversity of actors involved in atrocities¹¹ but there is some practice with regard to holding to account international state and non-state actors through reparations. In relation to the Chixoy dam project, which was funded by the World Bank and involved Guatemalan state forces massacring and displacing communities along the Rio Negro where the dam would be situated, the IACtHR ordered reparations against the Guatemalan state and was accompanied by a separate reparations settlement to communities by the World Bank.¹² Similarly, reparations have been awarded against militia and the DRC government for its security forces’ collusion in committing atrocities.¹³

International criminal justice mechanisms, like the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC), have further broadened the scope of the right to reparations in international law by enabling victims to

¹⁰ *Jeronovics v Latvia*, Application 44898/10, European Court of Human Rights, 5 July 2016, para.105

¹¹ Principle 15, UN Basic Principles, A/RES/60/147

¹² *Case of the Río Negro Massacres v Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 4 September 2012, Series C No. 250; and US 2014 Consolidated Appropriation Act and April 2010 Reparation Plan for Damages Suffered by the Communities Affected by the Construction of the Chixoy Hydroelectric Dam in Guatemala.

¹³ *Military Court of Katanga, Affaire Ankoro*, 20 December 2004, RP 01/2003 and RP 02/2004. Similarly see *Ituango Massacres v Colombia*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 148 (IACtHR, 1 July 2006), para.409.

claim on the back of the conviction of individual perpetrators. Yet, the difficulty is the asymmetrical nature of such claims. This is evidenced by cases like *Bemba* where there were over 5,000 victims were claiming against one individual, who was subsequently acquitted, leaving the complex web of perpetrators and organizations responsible for such international crimes unaccountable (Moffett, 2014, p. 194). Moreover, the focus of reparations against convicted individuals limits it to the crimes for which they are convicted. The fact that most of the convicted individuals are indigent further means that reparations are funded and delivered by donors or bodies like the ICC Trust Fund for Victims. This creates further complications with the notion of responsibility by merging assistance and reparations; the former aimed at responding to vulnerable populations' needs, and the latter to remedy a breach of a legal entitlement (Dixon, 2016).

The creation of administrative reparation programs to address past violations has been accepted as a feasible way to address the rights of large victim populations.¹⁴ Redress was initially considered in this way with the 1983 Argentine transition alongside the matter of facilitating the exit of the military regime (Arthur, 2009). The reintegration of perpetrators and victims was regarded as the linchpin of a successful democratic transition and transitional justice - a moral response to victims (Murphy, 2017). Given that the discourses of these programs transcend law to borrow elements from ethics, medicine and theology, their answer to why victims should be repaired goes beyond the rights' violation, introducing rationales like reconciliation, social justice, civic trust and recognition (de Greiff, 2006). In Colombia, two large reparation programs are aimed at providing redress to over 8 million victims, including compensation, restitution of land, and specialized healthcare services (Sikkink et al., 2015). Difficulties remain in how to determine the scope of harms and eligible victims (which family members and dependents to include), who may pursue claims on behalf of

¹⁴ *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para.470.

deceased victims, what amount of evidence needs to be proven, and how to deal with fraudulent claims.

While legal debates have advanced victims' rights to reparations, there still remains a long way to go in making such a right practical to many victims who are historically marginalized and continue to face insecurity and recrimination. This challenge is further compounded by moving from private law principles intended to redress individual grievances, to responding to the rights of thousands to millions of victims of mass atrocities.

Articulating the Boundaries of Reparations

While scholars agree on the importance of reparations for transitions from conflict and authoritarianism, debates remain over their conceptual and practical margins, in particular over (i) the place of reparations in different forms of justice and (ii) the boundaries between reparations programs and related interventions from the development and peacebuilding fields. These discussions stem from broader disciplinary, methodological, and conceptual debates over the limits of transitional justice, a field of both inquiry and practice concerned with states' reckoning with and emergence from authoritarian rule and grave conflict. Transitional justice has always been motivated by boundary questions and struggles over the legitimacy of its many topics and varieties of capital.¹⁵ As transitional justice globalized beyond the third wave of so-called "paradigmatic transitions" with which it was initially associated, scholars challenged more limited conceptions of corrective justice by pushing the field to embrace the lessons—and some goals—of fields like peacebuilding and

¹⁵ For discussions of struggles over the contours and boundaries of transitional justice, see Arthur, 2009; Bell, 2009; Fletcher, 2015; Mani, 2008; McEvoy, 2007. For a discussion about how transitional justice's proximity to international criminal justice influence competition between local and global approaches to justice see, Dixon & Tenove, 2013. For discussions of competition between local and global approaches to transitional justice, see Shaw, Waldorf, & Hazan, 2010.

development.¹⁶ These included critiques of legalism (McEvoy, 2007), calls for more distributive justice (Nagy, 2008; Sriram, 2014), arguments for the recognition of economic violence (Sharp, 2014b), calls for more consultation with local actors and attention to their local priorities (Sharp, 2013; Weinstein, Fletcher, Vinck, & Pham, 2010), and articulations of the complexity of justice and reconciliation in local contexts (Baines, 2010; Branch, 2011; Fletcher, 2009; Fletcher & Weinstein, 2002; Hovil & Quinn, 2005; Lundy & McGovern, 2008; Quinn, 2009).

Transitional justice encompasses multiple academic disciplines, including law, social sciences, cultural studies, development studies, education, history, philosophy, psychology, theology and more. It also contrasts articulations of distributive justice—that transitional processes must expand beyond rights violations to confront the broader social injustices and sources of inequality that underlie conflict (Nagy, 2008; Sriram, 2014; Mani, 2008)—with articulations of corrective justice—that transitional justice should be concerned primarily with correcting wrongful acts or losses (generally those stemming from political violence) and that distributive concerns should remain for social services and development actors to address (de Greiff, 2009; Fletcher, 2015; Lenzen, 2009; McCarthy, 2009; Waldorf, 2012). Several scholars, furthermore, have sought to move beyond old debates between distributive and corrective justice with notions of ‘transformation’, arguing that while transitional justice processes should remain focused on rights violations, they must not merely restore victims to their pre-harm condition but rather help them overcome the discrimination and marginalization that contributed to their victimization (Firchow & Mac Ginty, Forthcoming; Gready & Robins, 2014; Lambourne, 2009; Uprimny Yepes, 2009)(Gready & Robins, 2014, p. 347). At the same time, there is still a range of meanings that scholars ascribe to

¹⁶ For a discussion of transitional justice’s initial association with and shift away from so-called “paradigmatic transitions”, see Arthur, 2009; Sharp, 2015; Teitel, 2014.

‘transformative justice’ (Gready & Robins, 2014, p. 350) and its articulation in practice remains an open empirical question.

Within transitional justice, debates between the corrective and distributive aims of justice have shaped scholars’ approach to reparations. These debates play out along four main axes: what kinds of acts should be subject to reparations—violations of only political rights (corrective), of also economic, social, and cultural rights (transformative), or of broader social injustices (distributive); how should reparations be provided, for example, as only compensation or as more ‘holistic’, individually and/or collectively, etc. (while these do not easily map onto debates about justice, corrective justice has tended to be more narrow in its favoring of individual compensation and distributive justice broader in its inclusion of social welfare); what are the goals of reparations, for example, to restore victims to their pre-harm status (corrective), to more fundamentally transform their lives (transformative), or to redistribute social goods and burdens (transformative); and, finally, what are the criteria for determining how much is owed to achieve these goals, especially given the financial constraints of societies in the wake of conflict (here, justice debates do not easily map as it depends also on the legal context in which the programs is taking place).

The key is finding a balance that can maintain ‘sensible divisions of labor’ within transitional justice between these various articulations of justice (de Greiff, 2009, p. 29). For reparations, various frameworks have sought to locate such balance. Laplante (2014, 2015) proposed one of the most thorough and holistic approaches as a ‘justice continuum’, which begins with reparative justice at its most narrow and expands gradually to include restorative justice, then civic justice, and finally socioeconomic justice. Concerns about the place of economic issues in transitional justice have been ever-present, particularly as the field has

expanded to include post-conflict transitions (Miller, 2008)²¹ and arguments for the significance of economic, social, and cultural rights to transitions have crystalized (see, e.g., Arbour, 2007). Sharp (2014a, p. 79), for example, argues that transitional justice measures, including reparations, should account for serious economic violations like corruption, looting of natural resources, financial theft, pillaging of a country's economic infrastructure and other violations of civilians' ESC rights, in addition to the more traditional terrain of political violence, since 'for many victims, it is the combination of both physical violence and economic violence that makes conflict utterly devastating' (See also Carranza, 2008; Mani, 2008).

Ultimately, no matter how comprehensive or transformative, reparations will not be sufficient to address the full extent of crimes committed, rights violated or harm suffered during conflict. There will always be immediate needs that fall outside the boundaries of a particular program. In response, a number of reparations programs, including the Colombian and ICC programs, have adopted the rhetoric of transformation, claiming to transform victims' lives through the use of comprehensive measures in lieu of financial compensation alone. These programs utilize combinations of reparations and 'assistance' to expand the reach or fill in the gaps of reparations programs. This is not a given combination—rather, the use of assistance to respond to gaps in reparations programs stems in part from the efforts civil society and academic advocates to make reparations programs more victim-centered (see Dixon & Tenove, 2013). Reparations and assistance can be distinguished according to several principles: responsibility; recognition; process; form; and impact (Dixon, 2016, p. 89). While the two are provided through distinct processes and forms, and to different ends, their similarities underline the challenge of articulating the boundaries of reparations. They can, in practice, be identical in form, produce similar outcomes, be distributed through similar

²¹ For discussions of economic, social and cultural rights versus civil and political rights in transitional justice and reparations, see Firchow & Mac Ginty, 2013; Uprimny Yepes, 2009.

channels and by similar institutions, and impart similar feelings of recognition and notions of responsibility.

These similarities motivate questions about what distinguishes reparations—both in form and in impact—from other varieties of international and domestic intervention after conflict. Articulating the difference between reparations and development, or “assistance”, is difficult because of the nature of conflict and post-conflict contexts. Along with the devastating consequences of physical violence and violations of political and civil rights, societies struggle with severe poverty, inequality, and other “developmental deficits” after conflict: weakened institutions, devastated infrastructure, debilitated governance, insecurity and depleted social capital (de Greiff, 2009; Uprimny Yepes, 2009). These stem not only from the ravages of violence, but also emerge within and from wartime (and authoritarian) political economies, characterized by excessive military or paramilitary spending, corruption, rent seeking, pillaging of natural resources, land theft, and more (Addison, 2009; Sharp, 2014a). These, in turn, can cause extreme inflation, debt, and other forms of economic destabilization that reinforce cycles of conflict and limit the resources available for transitional justice responses, especially when actors who profited from war remain in power during peace (Moffett, 2017). A society may emerge out of authoritarianism or conflict, but the fundamentals of its underlying political economy remain entrenched (Addison, 2009). The result is a profound tension between the state’s obligation to uphold the right to reparation for political and civil harms most commonly associated with physical violence and its obligations to restore and uphold the economic, social, and cultural rights of its citizenry, whether threatened by conflict, poverty, or inequality (Uprimny Yepes, 2009).

Further complicating the task of articulating the boundaries of reparations vis-à-vis related interventions, some scholars have noted the similarities between wartime economies and facets of economic globalization. Forced displacement, for example, does not only occur

during armed conflict, but can result from ‘dams, mines, wildlife reserves and parks, palm oil plantations, and other “development” projects’ (Roht-Arriaza, 2014, p. 131). Is a country’s dispossession of land for resource privatization an act of economic violence in need of a transitional justice narrative, a consequence of globalization, both (See Dixon, 2017b)?

Reparations provide the most direct link between conflict-related harms and victims’ most pressing needs (Roht-Arriaza, 2014; Roht-Arriaza & Orlovsky, 2009). They also provide a key opening to notions of socioeconomic justice (Laplante, 2014, 2015). In practice, reparations and development or humanitarian interventions can look very similar, especially from the perspective of victims who receive them. Often, victims benefit from multiple state-based and international interventions simultaneously, for which they qualify through different, but interrelated eligibility criteria. Reparations are also often conflated with monetary compensation. Indeed, reparations can provide a ‘developmental boost’, central to the future-oriented moment of transitional justice (de Greiff, 2009). Reparations for violations of economic, social, and cultural (ESC) rights in particular can offer a response to some of the more salient and immediate consequences of conflict, further blurring the lines between reparative justice and assistance. Yet, reparations can also individualize harm, whether physical or economic, and as such can exacerbate inequality, poverty, and other more structural economic issues (Miller, 2008), or undermine indigenous understandings of identity, collectivity, and resources. Among state-based administrative programs, some scholars have warned that reparations should not replace states’ broader responsibility to guarantee social services or undertake economic reforms (Roht-Arriaza, 2014; Uprimny Yepes, 2009).

Reparations and assistance are provided either in tandem or in succession in programs implemented by the ICC, Colombia, Peru, Nepal, and Indonesia. While they vary in practice, three general approaches stand out, some articulated more explicitly than others: a subsistence

model, where assistance is seen to help victims achieve a more stable situation before they can fully benefit from reparations; a related, but unique, interim relief model, where assistance is used to respond to victims' immediate needs as they wait for reparations; and a 'gap' model, where assistance is used to fill in the holes of a legally restricted reparations process.

In the Colombian subsistence model, assistance is provided before reparations to help guarantee a minimal level of subsistence for victims, with the theory that such a basis is needed to enable victims to fully benefit from the transformative and long-term impacts of reparations (Gaviria, 2015). The interim relief model is similar, though it sees assistance not as a step up to reparations, but rather as a bridge to provide for basic needs while victims wait for an eventual reparations order or for their requests to be processed by a state. This approach is present in Nepal's Interim Relief Program and in the ICC's legal framework, albeit only in theory for the latter. The assistance mandate of the ICC Trust Fund for Victims has been deployed by the Chambers more as a 'gap' model, intended to reach people harmed by conflict-related acts who fall outside the scope of the crimes charged by the Prosecutor. In *The Prosecutor v. Thomas Lubanga*, for example, the Appeals Chamber wrote that, 'the meaningfulness of reparation programs with respect to a community may depend on inclusion of all its members, irrespective of their link with the crimes for which Mr. Lubanga was found guilty.'²² As such, the judgment implied, affected communities may be better off not knowing what is received as assistance and what is received as reparation. While all three models assume that victims can distinguish between reparations and assistance, they also pose significant questions for researchers about how victims receive the two forms of support on the ground (Dixon, 2017a).

²² "Reparations Judgment, Appeals Chamber, *Lubanga*, 3 March 2015," 3 March 2015, para. 215

Politics of Reparations

In the last two decades, critical transitional justice studies have turned the tools of analysis inwards to reflect upon the practices and discourses of transitional justice. The politics of reparations offers ample scope for study as reparations go to the heart of political and ideological debates on the past. Who is deemed to be deserving of being recognized as a victim, who is responsible for making reparations, or if wrongdoers will acknowledge their responsibility stand out amongst these considerations, as post-transitional societies find that the demands of victims must be balanced against the interests of powerful authoritarian elites. Efforts to theorize the equivocal relationship of victims with reparations have now complemented the initial focus of transitional justice studies on inter-elite pacts and democratic consolidation.

Despite the growing cultural and socio-political prominence of victims, it has been noted that not all victims are equal with regard to reparations, as limited and selective empowerment has favored specific categories. First, hierarchies of victims promote competition on the grounds of agency and innocence (McEvoy & McConnachie, 2012, 2013). Second, given characteristics like socio-economic status and educational background some victims are in a better position to challenge, access, and make the most of reparations. Third, disparities amongst victims also mean that reparations have dissimilar impacts on them. By showing victims to be a heterogeneous category, critical transitional justice studies calls into question the monolithic construction of victimhood implied by labels like ‘victim-centeredness,’ commonly used for truth commissions and reparations (Aldana, 2006; Nwogu, 2010; Robins, 2011; Sriram, 2013). Finally, the reification of the categories of victim and perpetrator into distinct groups ultimately does a disfavor to all parties by failing to recognize the messy reality of conflict (Balasco, 2013; Bell, 2009; Madlingozi, 2010; McEvoy, 2007).

Victims are both actors and the ‘primary subjects’ of reparations (Girelli, 2017, p. 9). On the one hand, legal and political action by victims has been instrumental to the creation of the reparations regimes. In the context of World War II, Jewish Holocaust survivors led this process against the losing side (Elster, 2004, p. 54f; Ludi, 2012) and the forcefully interned Japanese-Americans - against the winning side (Yamamoto & Ebesugawa, 2006). The campaign for reparations by the ‘Comfort Women’ in Korea is an example of victims’ political struggle for relevance and recognition in the face of a state’s intransigence or dominant discourse on the past (Soh, 2003). The Asian Women’s Fund was set up in 1995 by the Japanese government to provide services and compensation in recognition of the needs of these now elderly women who were sexually enslaved by the Japanese Imperial army during World War II. The women rejected the initiative as no official apology acknowledging the wrongdoing accompanied it (Tolbert, 2016). Given this omission, this fund was perceived to be awarded as a matter of charity, gift or assistance, not rights, thereby ‘cheapening’ the women’s reparative claims (Roht-Arriaza, 2004, p. 128). Examples of legal action by victims include the query of constitutionality of Law 975/ 2005 by Colombian victims and the wide use by Guatemalan victims of the Inter-American Human rights system to call attention to the human rights violations of the civil war. Where the Colombian Constitutional Court established a holistic regime of truth and reparations that balances the rights of perpetrators with those of victims,²³ the perseverance of the Guatemalan victims ultimately resulted in the establishment of the National Reparations Program (Mersky & Roht-Arriaza, 2007, p. 27).

On the other hand, victims are also the direct beneficiaries of reparations. Ideas of innocence, purity, helplessness, and vulnerability (Laplante, 2007) have been used to distinguish between who may be considered deserving of reparations and who should be excluded. As McEvoy and McConnachie (2012) argue, the innocent victim is placed at the

²³ *Gallón Giraldo and others v Colombia* [2006] Constitutional Court Colombia C-370/2006

‘apex of a hierarchy of victimhood and becomes a symbol around which contested notions of past violence and suffering are constructed and reproduced.’ Peru, Northern Ireland and Colombia are a few examples of contexts where the ‘clean hands’ doctrine has been used to exclude victimized perpetrators like child soldiers, now adults, and members of non-state armed groups regardless of the severity of the wrongs committed against them (Moffett, 2016). Such practices are not wholly consistent with international law. Ensuring the ‘clean hands’ of victims also glosses over the messy reality of conflicts and mass violence. Responsibility and victimhood can be temporal, complex and overlapping and complicate efforts to fit victims and perpetrators into neat binaries (Bouris, 2007; Madlingozi, 2007). Differences between victims and perpetrators were less polemic in South Africa, Timor-Leste, and Sierra Leone where reconciliation was the dominant narrative with regard to dealing with the past (Moffett, 2016).

Victims have also been pitted against each other in the struggle for limited resources for reparations (Govier, 2015, p. 59). Who is more deserving of reparations builds not only on the question of the unwarranted suffering of ‘innocent’ victims, but may also be tied to notions of who has suffered more. The debilitated state of the economy of many states emerging from large-scale conflict (Cowen, 2006, p. 18) puts them in the position of having to prioritize between different groups within the victim population based on the severity of harms suffered, on their experience of overlapping multiple harms as well as their socio-economic and social vulnerability. For example, criteria of vulnerability or need have been used in Peru²⁴ (Correa, 2013, p. 7) and Guatemala (Evans, 2012, p. 154) to give precedence to special categories, like women, children, disabled and elderly victims, in accessing health care provision in the first instance and compensation – in the second. The regulatory framework of the Guatemalan National Reparations Program also speaks of the severity of the violations,

²⁴ Executive Decree 015-2006-JUS

the socio-economic condition, and the social vulnerability of victims. The same criteria apply for collective beneficiaries. Law 1448/ 2011 gives special protections to a wide group of victims in Colombia. Criteria of vulnerability are applied in the case of women, young people, children, elderly, disabled people, peasants, social leaders, members of trade unions, human rights defender and victims of displacement. This differentiated approach is justified by the program's transformative logic. Building on constitutional protections, the same piece of legislation gives special recognition to indigenous groups, Afro-descendants, and other ethnic minorities.

As subjects of reparations, victims also compete with other groups that were involved in the conflict, like veterans of state and even non-state armed groups, for scarce resources. To take one example, following public disturbances, Guatemalan President Alfonso Portillo promised Q20,000, or about US\$2,599, to be delivered in three payments, to members of the Civil Self-Defense Patrols. Portillo treated this paramilitary group, who retain a significant power, as heroes and aimed to thank them for their service to the nation (Peacock & Beltrán, 2003, p. 47). It could be argued that such measures are paid to ex-combatants in the name of peace and reconciliation or transactionally in order to secure their collaboration with other transitional justice measures (Hazan, 2006, p. 44). This picture is, however, complicated by the fact that the blanket payments given to these actors, some of whom were implicated in atrocities, mean that they are better off than their victims. Although the Guatemalan Constitutional Court imposed a ban on the two remaining payments promised to the Patrols ("Expatrulleros exigen compensación económica," 2015), the amount promised is comparable to that offered to victims of torture and sexual violence within the National Reparations Program (Human Rights Ombudsman, 2006). The support for ex-combatants has been linked in some cases to an idea that veterans struggled for a better society, where victims are simply 'weak' and 'money grabbing' (Bucaille, 2011; Dzinesa, 2007; Rothschild, 2017).

Furthermore, the dignifying objective of reparations is undermined if they are deployed strategically to curry political favour in the run-up to elections or using reparations as a political vehicle to drive forward the government's narrative of the conflict or nationalist sentiments. Given the narrative supported by the Peruvian state, the human rights violations carried out by the state are regarded as excesses committed in the face of defense of the country against terrorists (Laplante, 2009, p. 82).

Recognizing that transitional states can be hard-pressed to finance reparations in the face of many competing demands on their resources, the Guatemalan (Comisión para el Esclarecimiento Histórico, 2004, p. 89)²⁵, the Salvadoran (Comisión de la Verdad 1992-1993, 1993, p. 268), and the South African (Truth and Reconciliation Commission of South Africa, 1998, p. 180) truth commissions all recommend creative solutions. Some states have indeed engaged international actors in funding reparations or capacity building. The International Organization for Migration, to take one example, has coordinated the delivery of reparations in a number of countries, such as Sierra Leone. One of the risks with such an approach is that these third parties may sway the agenda or the strategy of implementation, corrupting the purpose of reparations as acknowledgement (Roht-Arriaza & Orlovsky, 2009, p. 204).

As discussed in the preceding section, a central question emerges as to whether reparations provided without acknowledgement or recognition, or where their boundaries with assistance are blurred, can really be considered as such. The case of a reparations program rolled out in Peru between 2007 and 2011 is telling. Following the recommendations from its Truth and Reconciliation Commission, the Peruvian government phrased some of its collective reparations as development to address the historic social marginalization of those victimized. Other programs, like Indonesia's in the Aceh region, attempted similar blends. Nevertheless, a 2009 study in Peru revealed that more than half of those surveyed could not

²⁵ Petersen, Samset & Wang (2009) show that, in the cases of Rwanda and Guatemala, about 5 percent of all development aid went to transitional justice. Of these, 20 percent was directed to reparations in the case of Guatemala, and 5 percent - in Rwanda.

identify its reparative aims and nearly a third did not know the project was a form of reparation (Correa, 2013, p. 14). The Colombian program has faced similar questions (Pham et al., 2016). Such questions are testament to the controversy that surrounds transitional justice processes in general. The financial implications that reparations have for the state and other contributing actors add to what are already complex political affairs (Kutz, 2004, p. 278). The political and financial costs of these policies have moved policymakers and scholars alike to abandon the normative impulse that guided the contemporary beginnings of transitional justice in Latin America (Arthur, 2009, p. 334) in favor of evaluation and impact assessment.²⁶

Assessing the Impact of Reparations

Following Reiter (2017), researchers have evaluated the impact of transitional justice at three different levels, namely the micro, the meso, and the macro. Each of these levels is associated with its preferred methods and research questions. Furthermore, given the division of labor between academic disciplines, these evaluations have been carried out differently by each field of research (Millar & Lecy, 2016). Where the individual focus of psychology, for example, places impact studies within this field at the micro-level, the global or international emphasis of international relations scholars situate their research on the macro-level. Finally, the passage of time and the continued application of these mechanisms worldwide has given researchers the capacity to move from comparative case studies based on small, unrepresentative samples to large-n studies. This variety of approaches has meant that we struggle to reach a definite resolution with regard to the effects of transitional justice mechanisms. Focusing on the specific issue of reparations, this section underscores that answering the question of whether they work is far from straightforward, as different

²⁶ For the difference between impact and evaluation, see Dancy (2010).

theoretical, methodological, and practical choices have led to divergent, even contradictory, conclusions (Brahm, 2007). This situation is compounded by the fact the majority of transitional justice impact studies have concentrated on trials and truth commissions, rather than reparations. This is a surprising state of affairs considering the political and economic costs of reparations (Kutz, 2004).

At the micro level, studies tend to focus on individual victims, perpetrators, or members of society more widely. They seek to gauge these individuals' perceptions and experiences of transitional justice instruments (van der Merwe, 2009, p. 123). When they approach victims, they examine research questions like whether individual victims are satisfied with reparations (de Waardt, 2013), whether these have alleviated their harms and improved their welfare (David & Choi, 2005), or whether their views and attitudes are different from those of other social groups (Pham et al., 2016). The starting point of these studies is that socio-economic context and culture affect the terms in which individuals describe themselves, their needs and expectations, and, ultimately, the impacts that reparations may have on their lives²⁷ (Robins, 2012). This means that evaluation depends here on the capacity of the research to grasp 'the local' (Baines, 2010; Waldorf, 2006).

Ethnographic methods, the observation of individuals and communities, extensive in-depth interviews, documental research, focus groups and surveys are the preferred methods of these studies. Cross-sectional surveys are usually deployed to distinguish between the attitudes of two or more different groups of stakeholders, while longitudinal surveys aim to assess how their attitudes have changed over time.²⁸ In one survey in Colombia, for example,

²⁷ See also Firchow (2017) who uses a participatory methodology to inductively collect Everyday Peace Indicators for two Colombian communities she works with.

²⁸ See Backer (2010) who shows the decline of support for the conditional amnesty given by the South African {"citationID": "xZEo4t3a", "properties": {"formattedCitation": "(2010)", "plainCitation": "(2010)", "noteIndex": 28}, "citationItems": [{"id": 2195, "uris": ["http://zotero.org/groups/1514175/items/WDHTRDDQ"], "uri": ["http://zotero.org/groups/1514175/items/WDHTRDDQ"], "itemData": {"id": 2195, "type": "article-journal", "title": "Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa", "container-title": "International Journal of Transitional Justice", "page": "443-456", "volume": "4", "issue": "3", "source": "academic.oup.com", "abstract": "1 Despite the extended nature of many

victims and non-victims did not express significantly different views about transitional justice mechanisms (Nussio, Rettberg, & Ugarriza, 2015).²⁹ Even when they refer to basic descriptive data, surveys can shape our understanding of who victims are, what their needs are and how these can be addressed appropriately (Rettberg, 2008; Taylor, 2015). Nevertheless, it is worth pointing out that this perceptions-based approach to reparations research poses some ontological challenges. Can survival, livelihood, and justice concerns be meaningfully compared? To what extent should reparations be designed according to the development and security concerns of their intended beneficiaries? If “victim satisfaction” is considered a benchmark for successful implementation of reparations, how much better off do victims have to be in comparison to other vulnerable groups?

Furthermore, perception surveys can reinforce global narratives of transitional justice, drawing on top-down indicators of reparative justice that are reinforced by the international organizations who often fund surveys and have their own institutional interests. In this sense, the ‘everyday peace indicators’ approach remains a promising avenue (Firchow, 2017).

transitional justice processes, collection of relevant longitudinal primary data, especially at an individual level, is rarely observed as a means of assessing the impact of formal measures. This article reports on a panel survey conducted in 2002–2003 and 2008 with 153 victims of apartheid-era violations from Cape Town, South Africa. During the interval between the two waves of the survey, both undertaken after the Truth and Reconciliation Commission (TRC) completed its work, government policies concerning reparations, prosecutions and pardons undermined the compromises that were central to the TRC process and integral to the democratic transition. The data analysis shows that approval of the unique conditional amnesty offered by the TRC was at first surprisingly high, with many respondents acknowledging its practical rationale, but it fell dramatically by 2008. This decline in support is associated with an increased sense of the unfairness of amnesty and dissatisfaction with the extent of truth recovery. Knowledge of and attitudes about prosecutions and pardons do not appear to be contributing factors, though the results indicate a greater desire for accountability, even at the risk of instability. The findings emphasize the need for rigorous, ongoing evaluation of transitional justice processes to appreciate properly the complex and dynamic nature of individual attitudes and the influence of emergent events.”, "DOI": "10.1093/ijtj/ijq015", "ISSN": "1752-7716", "shortTitle": "Watching a Bargain Unravel?", "journalAbbreviation": "Int J Transit Justice", "language": "en", "author": [{"family": "Backer", "given": "David"}], "issued": {"date-parts": [[2010]]}, "suppress-author": true}, "schema": "https://github.com/citation-style-language/schema/raw/master/csl-citation.json"} (2010) who shows the decline of support for the conditional given by the South African TRC to be linked to the dissatisfaction with the extent of truth recovery and changes in views regarding the fairness of the amnesty policy. Reparations, prosecutions and pardons did not play any significant part.

²⁹ The fact that “reparations” asks the respondent to consider if channelling resources to reparations can be seen as fair when other social groups face similarly urgent social needs means that this variable captures, on the one hand, whether victims’ needs should be prioritized, and, on the other, whether the respondent is willing to assume the burden.

Relatedly, ethnographers and forensic anthropologists call attention to the fact that the meaning that words like ‘reparation’ holds for victims varies (P. Pham & Vinck, 2007), going beyond the well-established universalizing tools of restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition (Robins, 2013; Sanford, 2003). The lived experience of victims, and therefore evidence of success or failure of reparative programs, may also be captured through observation, focus groups, and in-depth semi-structured interviews that offer richer understandings of the transformative potential of reparations (Weber, 2018, p. 92).

The meso level considers the institutional aspects of transitional justice instruments, comparing their effectiveness on their own terms. While some work has looked at the institutionalization of reparations programs (Pham et al., 2016 component 2), truth commissions are at the core of this type of research (Burnet, 2010; Dancy, Kim, & Wiebelhaus-Brahm, 2010; Hayner, 1994; Van Zyl, 1999). Archival research, observation, and interviews with policymakers and bureaucrats involved in the implementation of these mechanisms are the most common data collection methods. This research relies primarily on case studies for its analysis. Beginning with the understanding that the quality of transitional justice instruments varies greatly, these studies aim to take stock of whether the bodies set up did, in fact, complete the work they set out to do, focusing on the effectiveness of their design and the execution of their mandate. Research focusing on the provision of reparations considers success in terms of victim participation and ownership of the reparations, coverage and promptness of delivery, outreach and ease of access, existence of discriminatory practices, and the effectiveness of institutional structures designed to screen victims and provide awards (Blakeley, 2013; Correa, Guillerot, & Magarrell, 2009, p. 407f). Pham et al. (2016, component 2) note the importance of assessing such programs in terms of their

integration—both vertical, between federal, state, and municipal authorities, and horizontal, across the various government ministries who play a role in service provision.

The limitations of these studies stem from three sources. First, considering that the majority of the reparative programs function based on an executive decree, legislation, or cabinet resolution, their very mandate limits their effects by, for instance, restricting the coverage to a specific category of victim. This was the case of reparations offered in Chile, where the victims of torture and political prisoners were only considered eligible starting in 2003 (Lira, 2006, p. 57). Second, the focus of these studies on institutional effectiveness bypasses matters of perceptions and differential impact of transitional justice tools on the lives of victims (Rubio-Marín & de Greiff, 2007, p. 328). This is particularly important when taking into account complex victims (Laplante, 2007; Moffett, 2016) and the vulnerability of specific groups (Laplante & Rivera Holguin, 2006). Third, by analyzing the effectiveness of one mechanism at a time, these studies can miss the bigger picture. They, thus, fail to consider where the mechanism under examination fits in the larger puzzle of transitional justice in that respective context. This, in turn, means that they have difficulties in assessing the impact of that particular mechanism on human rights culture, peace, democratic consolidation, and reconciliation. The case of the Colombian Special Administrative Unit for the Management and Restitution of the Dispossessed Land is illustrative. Despite the strides it has made in restitution, with more than 300,000 hectares of land returned since its establishment in 2011, land-grabbing continues and few of those covered by the judgements can actually enjoy the use of their lands (“El despojo de tierras ‘sigue sucediendo’ en Colombia,” 2018).

Macro level studies respond to this final predicament (Kaye, 1997; Lambourne, 2009; Wiebelhaus-Brahm, 2009). The fact that quantitative methods rely on a threshold of sufficient cases to build inferences means that these studies initially used comparative case studies as their main method (Baker, 2009). Cases taken from the same region were contrasted to trace

the relationship between the application of different transitional justice mechanisms and their varying degrees of human rights protection and democratic scores (Barahona de Brito, 1997; Fletcher, 2014; Roniger & Sznajder, 1999). Reparations feature in the cross-national quantitative databases of Olsen, Payne and Reiter and Lie, Binningsbø, and Gates, but only the latter study zooms in on the impact of reparations. They are shown to significantly reduce the risk of peace failure only in post-conflict democratic societies. When both autocratic and post-conflict democratic societies are considered, reparations together with the other transitional justice mechanisms have weak positive, but insignificant, effects.

Commendable as these studies are for their effort to lay bare a global trend, their results are also oftentimes contradictory and questionable (Thoms, Ron, & Paris, 2010, p. 331). Inconsistencies originate in that significant variations in type and quality of reparations are ignored, referring only to whether such measures were adopted or not. Some studies derive specific issues from the flawed measurement of the outcome variables in their datasets of origin. Lie, Binningsbø, and Gates, for instance, use Uppsala PRIO Conflict Data Base for their post-conflict societies. Given that this dataset captures conflict in dyads where the government is facing multiple rebel groups, the number of post-conflict societies may be artificially inflated (Stewart & Wiebelhaus-Brahm, 2017, p. 116). Further, the operationalization of reparations is oftentimes different: where some refer to reparations in exclusively monetary terms (Olsen, Payne, & Reiter, Andrew G., 2010, p. 37), others add a symbolic dimension (Lie, Binningsbø, & Gates, 2007, p. 7). Finally, results differ due to the timeframe of each database. The cut-off point for data collection is 2003 for Lie, Binningsbø, and Gates and 2007 for Olsen, Payne and Reiter. If one conflates political stability with peace, as is often the case in this type of studies (Leebaw, 2008, p. 117), the question of how long a country must avoid renewed violence to be said to have had successfully implemented transitional justice mechanisms remains open (Reiter, 2017, p. 280). Considering the relative

novelty of the practice of transitional justice, has it even been around long enough to plant the banner of success?

The disagreement about the effects of transitional justice, and therein reparations, reflected in these studies is due to the fact that each of them grapples with a *different* puzzle and does so in a *different* way. On the one hand, these studies disagree on what transitional justice is supposed to deliver. Is it, to take just a few examples, victim satisfaction, stronger institutions, or peace? On the other hand, researchers are not in agreement about how to measure these effects. Nevertheless, what they do share is an instrumental and, moreover, static understanding of transitional justice. Taking the view that transitional justice is an outcome-oriented set of tools, they place the goalpost in the moment of the data collection and seek to account for how closely the current state of affairs matches that golden standard. For these studies, transitional justice becomes a stop in the “post-conflict checklist” (Sharp, 2013) whose various elements must be ticked off with the expectation that peace would take root. Because transitional justice is worth doing only insofar as it delivers other goods, it is easy to see why some might be pessimistic when those coveted results seem distant (Reiter, 2017, p. 283).

Transitional justice moved beyond criminal accountability, to develop a score of mechanisms with multiple addressees and goals that are unclear if not directly at odds (Bell, 2009; Leebaw, 2008). Recognizing this, McAdams introduces the understanding of transitional justice as process (McAdams, 2011, p. 311). He contends that transitional justice is never over *as such* because the past may never be dealt with to a degree that is satisfactory to all parties. Neither transitional justice nor peace are end-point states to be reached by adopting a series of mechanisms from a list, where more measures equal higher proceeds. Rather, it is the transitional justice effort itself that makes the attempt worthwhile because the practice of transitional justice is itself “a positive exercise in civic affairs” (McAdams, 2011,

p. 312). Spain (Aguilar & Payne, 2016) and various Latin American cases (Collins, 2010) are clear examples that transitional justice may never be completed as legacy issues continue to haunt politics more than thirty years since transition (Reiter, 2014). Yet, the transformative effects of the transitional justice enterprise might actually stem from this continual pursuit that builds citizenship (Weber, 2018).

Conclusion

As a justice instrument whose power is derived from the law, reparations are an imperfect tool for responding to the full range of individual, social, economic, cultural, political, and civil harm suffered during conflict. In these situations, the sheer number of victims, with their diversity of needs and priorities, will inevitably test the limits of reparations programs. There is an inherent tension between expanding such programs to be inclusive, flexible, and adaptable while at the same time preserving their fundamental identity and power as justice processes. This is a difficult balance to strike for both scholars and practitioners, and the debates reviewed in this Chapter will not be resolved soon.

The gaps in empirical research on the implementation of reparations in practice, their effectiveness, and their ultimate impact on victims and (post)transitional societies provide opportunities to researchers to make inroads and move these debates forward. The particular means through which the inward and outward feelings, perceptions, and broader social, economic, and political changes that reparations are expected to produce remain undertheorized—largely because of a lack of empirical evidence regarding their reality on the ground. An expansion of reparation practice in post-conflict situations at the state and international levels has created new opportunities for human rights and transitional justice research. Questions about the particular variables that drive reparations outcomes—and the

contexts that influence them—represent the next frontier for researchers interested in the role of reparations in the transition from conflict to peace.

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