



# **R E D R E S S**

*Seeking Reparation for Torture Survivors*

## **Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making**

The Peace Palace, The Hague, The Netherlands  
1-2 March 2007

### **Report of Proceedings**

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*“In honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,*

*Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large...”*

Preamble, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly on 16<sup>th</sup> December 2005.

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## I. BACKGROUND ON THE ORGANISERS

**The Clemens Nathan Research Centre** is an organisation dedicated to the promotion of international human rights. It is the research arm of the Consultative Council of Jewish Organisations, a human rights NGO with consultative status at the United Nations, founded in 1946 by the Nobel Prize Laureate Rene Cassin. Its constituent organisations are the Anglo-Jewish Association and the Alliance Israelite Universelle. It is named after Clemens Nathan, who is also its first chairman. The activities of both organisations have included holding lectures and conferences, and sponsoring books on human rights.

**The Redress Trust (REDRESS)** is an international nongovernmental organisation with a mandate to assist individuals and communities who have suffered torture and related international crimes. The organisation works to obtain justice for survivors, hold accountable the governments and individuals who perpetrate torture and develop the means of ensuring compliance with international standards and securing remedies for victims. REDRESS pursues its mission by providing legal assistance to individuals and communities in securing their rights; advocating with governments, parliaments, international organisations and the media and working in partnership with like-minded organisations around the world. It is one of the leading organisations working to advance the principle of reparations for survivors of the worst human rights abuses, and continues to work nationally and internationally - at the United Nations and before international jurisdictions such as the International Criminal Court.



Alan Stephens, Carla Ferstman, Clemens Nathan, Cecile Insinger

## II. INTRODUCTION

The Conference *Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making*, organised by the Clemens Nathan Research Centre (CNRC) in collaboration with REDRESS, took place at the Peace Palace in The Hague, The Netherlands on 1-2 March 2007. The organisers are extremely grateful to the Carnegie Foundation of The Hague and the Shores Charitable Trust for supporting this initiative, and to the range of speakers and participants that enriched the sessions. The organisers also wish to thank Cecile Insinger for her invaluable help in administering the Conference and to Adam Lang at REDRESS for compiling the notes of the proceedings.

The idea for this Conference came out of discussions between CNRC and REDRESS on the

challenges for victims of the most serious international crimes to access effective and enforceable remedies and reparation for the harm they suffered. The organisations understood the need to ensure that the many initiatives of governments and regional and international institutions to afford reparations to victims of genocide, crimes against humanity and war crimes take account of the wide and varied practice that had been built up in the past decades. In particular, the Conference sought to consider the long practice of the Conference on Material Claims against Germany (the Claims Conference) in respect of the Holocaust restitution programmes, as well as the practice of truth commissions, arbitral proceedings and a variety of national processes to identify common trends, best practices and lessons learned.

The emphasis of this Conference was not on ‘whether’ there is a right to reparation, and if so ‘what’ this right entails. The Conference recognised that there is already a sound legal basis for the right to reparation as well as detailed expositions of the different forms that reparation may take.

Instead, the Conference focused on the effective implementation of the right to reparation. It explored the practice of governments, national and international courts and commissions to consider questions of application, process, implementation and enforcement. It also considered the practice from the perspective of the beneficiaries - survivors and their communities; and from the perspective of the policy makers and implementers who are tasked with resolving the range of technical and procedural challenges in bringing to fruition adequate, effective and meaningful reparations in the context of mass victimisation.

The holding of the Conference in The Hague, The Netherlands was by no means incidental. Indeed, one of the key aims of the Conference was to lend support to the International Criminal Court (ICC), as it embarks on the implementation of its reparations mandate. One of the most important and innovative aspects of the ICC is its ability to afford reparations to victims. Its’ Statute and Rules enable the competent chambers to award reparations to victims after a conviction, and a

separate trust fund for victims exists to complement the work of the Court in these endeavours.

This Report attempts to summarise the main issues and debates which arose in the course of the Conference. Further information on this Conference and the interventions can be obtained through the organising organisations. Many of the speakers’ presentations can be accessed through the organisers’ websites.

### III. SUMMARY OF CONFERENCE DELIBERATIONS

#### A. Key Themes

Genocide, crimes against humanity and war crimes are recognised worldwide as the most abhorrent of crimes; and the perpetrators understood as enemies of all mankind (*hostis humani*). It has long been recognised that the perpetrators of such crimes must be held to account and that the institutions, organisations and governments that enabled the abuses to occur should not escape liability. International law recognises the obligation to provide reparations for international wrongful acts.<sup>1</sup> This has been repeatedly reaffirmed in the jurisprudence of national and international courts, is reflected in a range of international treaty texts and has recently been confirmed by the United Nations with the adoption by the General Assembly of the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law* in December 2005.

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<sup>1</sup> See Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001” (ILC draft Articles on State Responsibility).

## Rights and Procedures

Reparation for genocide, crimes against humanity and war crimes and other serious violations of international human rights and international humanitarian law has been traditionally conceived in the context of State responsibility for injurious international wrongs, particularly at the end of a conflict. The progressive recognition of the status of individuals under international law owed in large part to the developments in international human rights law since the Second World War, has impacted on the concept and progressive application of the principle of reparation in a number of fundamental ways:

- i) ***Reparation is understood as a right of victims, not only as an inter-State prerogative or an act of compassion or charity***

Reparation is a moral imperative seeking to mend what has been broken. It can contribute to the individual and societal aims of rehabilitation, reconciliation, consolidation of democracy and restoration of law. It can also help to overcome traditional prejudices that have served to marginalise certain sectors of society and contribute to the crimes perpetrated against them.

It is also a legal right owed to the survivors.

- ii) ***The positive implementation of the right to reparation entails both a procedural right of access to the remedy as well as the substantive form of the relief***

**Procedural Challenges:** The procedural implementation of the right to reparation can prove challenging in a number of ways. For example, insufficient outreach to and consultation with targeted beneficiaries about reparations measures may reduce the impact of such measures with local communities, and lessen the likelihood that the special needs of particularly vulnerable or marginalised sectors of society (including women, children and minority groups) are adequately considered. The effectiveness of reparations measures can also be judged with respect to their accessibility to victims, considering whether the adopted measures adequately address evidentiary, logistical or other hurdles. For

example, beneficiaries that were forced to flee their homes may not have access to the same level of documentation; low literacy and education levels may mitigate against complicated forms or procedures.

**Substantive Challenges:** It is important that the form(s) of reparations (e.g., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) as well as the quantum and quality of the adopted measures adequately respond to the injurious acts and to the rights, needs and priorities of beneficiaries and survivor communities. Yet the nature of the crimes of genocide, crimes against humanity and war crimes, is such that it is impossible to put survivors back to their previous position prior to the violation or to 'repair' the violation. Necessarily, reparation measures for such crimes will be symbolic.

This Conference reflected these key precepts in its orientation, organisation, choice and emphasis of speakers.

## Survivors' Perspectives

A holistic appreciation of the adequacy and appropriateness of reparation measures (both access to reparations and the reparation measures themselves) requires consideration of survivors' perspectives, including their initial experience of victimisation as well as the impact this has had subsequently. Survivors' expectations of and satisfaction with reparations will reflect this, and will impact on how they relate to procedures for claiming reparations and the measures themselves.<sup>2</sup>

Reparation measures should reflect the particularities of the victimisation and its impact on vulnerable groups and whole communities. In many instances of mass victimisation, women represent a

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<sup>2</sup> Danieli, Y. (1992). Preliminary reflections from a psychological perspective. In T.C. van Boven C. Flinterman, F. Grunfeld & I. Westendorp (Eds.) *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Netherlands Institute of Human Rights [Studieen Informatiecentrum Mensenrechten], Special issue No. 12 (pp. 196-213). Also published in N.J. Kritz (Ed.) (1995). *Transitional justice: How emerging democracies reckon with former regimes*. 1 (pp. 572-582). Washington, D.C.: United States Institute of Peace.

disproportionately large number of the survivors and the violations they face are distinct and have differential impact on them and their communities. Equally, the use and abuse of children in conflicts will impact on them, their families and successive generations. As is noted in the preamble of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, “Contemporary forms of victimisation, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively.” For instance, the crime of genocide which by its nature targets national, ethnical, racial or religious groups impacts not only the individual victims but the collective identity of the group.

### **The Relevance of the Post Holocaust Experience**

The horror of the Holocaust led to major shifts in international law. The many restitution measures which resulted can be seen as important precursors for future national and international reparations processes. Some of the key markers from the Holocaust restitution measures which may have particular relevant to current and future reparations processes include:

- Rallying, unifying and building consensus within survivors’ communities to strengthen political leverage and support for reparations and to aid with distributions;
- Contributing to the procedural evolution of mass claims processes, by identifying special beneficiary categories with both individualised and collective awards schemes;
- Utilising streamlined claims processes with flexible evidentiary standards, innovative engagement of civil society groups, governments, specialised administrative tribunals and courts;
- Experience in the recovery of public and private assets and property.

The post-Holocaust experience must also be seen in a broader context, considering the range of mass claims processes that have developed alongside. Various mechanisms have

been employed to address the multitude of situations and objectives. Some of these mechanisms have served more political than judicial objectives, performing fact-finding functions and assessing payments, as opposed to evaluating liability that has been pre-determined by settlement or agreement. Certain processes have developed on a purely adversarial basis whereas others have sought to incorporate dispute resolution or settlement facilities into their activities, including conciliation and mediation.

Some tribunals have adjudicated claims against States, brought by States either on their own behalf or representing claims of nationals of States that have been espoused and presented on their behalf by their national governments. Claims mechanisms have also been established to resolve the claims of individual victims against their own State or a third-State, as well as to resolve claims of victims against various corporate entities or organisations. Some tribunals have dealt only with the restitution of victim assets, whereas others have sought to compensate for a broad range of harms caused. Some mechanisms have focused exclusively on monetary awards for verifiable real losses whereas others have sought to restore property or other assets.

Many claims mechanisms have successfully used categorisation schemes to determine distinct processes for different types of claims or claimants, with differing applicable rules and procedures. In determining the most appropriate approach, there has often been a tension between competing principles. On the one hand, the adoption of measures aimed at maximising procedural efficiency and cost-effectiveness. On the other hand, the need to maintain a minimum of procedural fairness and the overall legitimacy of the mechanism as a legally sound institution capable of accurate decision-making and compatible with generally accepted principles of international law.

Also relevant are the important steps taken by regional human rights courts, in particular the Inter-American Court of Human Rights, and the work of certain national post-conflict truth and reconciliation commissions which have sought to address reparation in the context of mass victimisation. To note is the frequent resort to health and education programmes to strengthen

victims' capacity for personal and social development and to rebuild lives and communities.

In the examples cited, liability for the injurious act(s) rests with the State. This has, in some instances, aided the funding and implementation of both individual and collective reparations programmes. States that have recognised their responsibilities to repair past abuses have set aside lump sums for distribution to victims, identified portions of annual State budgets, and introduced special taxes to collect funds. However, in some other cases, the will of governments to contribute to reparations programmes has waned quickly, with reparations falling below other demands on the States' budget, such as general societal development.

The examples also stand in contrast to reparations processes before national criminal courts, and indeed the International Criminal Court, whose mandate is limited to individual (as opposed to State) responsibility. Funding reparations for mass victimisation from the resources collected from individual convicted perpetrators will be necessarily a challenge. Also, placing the burden of reparations on the few who are convicted before a criminal court is difficult conceptually, given the nature of the crimes which require the extensive organisation and planning of governments or other entities. Certain crucial reparation measures will be difficult to implement using the sole lens of individual responsibility. For example, most measures of satisfaction and guarantees of non-repetition would require State involvement. This is also the case for other symbolic measures such as public acts and civic rituals designed to restore social ties between citizens. The reparations regime of the ICC can therefore not operate in a vacuum nor can its measures ever hope to fully satisfy victims' rights to reparation.

The International Criminal Court's Victims' Trust Fund should remedy some of the resource gaps created by indigent defendants unable to pay the reparations awards ordered against them. The Trust Fund is an important counterbalance to the Court's reparations process that can pool resources from a variety of sources, including voluntary contributions, for the benefit of victims and their

communities. Whilst the mandate of the Trust Fund is in many ways broader than that of the Court, it will remain difficult for it to adequately address the context of mass victimisation within which the Court's work is situated. Key questions remain unanswered:

- Who are the beneficiaries of the ICC's reparations programme and how closely connected must they be to the persons convicted by the Court? How does or should this impact on applicants' access to Court?
- Is the definition of the beneficiary class contingent on the conviction of the perpetrator(s) or can it be recognised that individuals' right to reparation exists notwithstanding? The UN *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* recognise that "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim," and the Court will need to consider how this principle relates to its procedures.

In determining methods, priorities and approaches to reparation there are a range of factors to consider which include:

- *How to ensure that the forms of reparation best address the needs of survivors and their communities?* There is no magic formula for reparation; identifying the most suitable remedies requires careful analysis of and consultation with beneficiary groups, taking into account variances of perspectives within beneficiary groups, and other divergences such as time, age, and experience during and post victimisation. Given the impossibility to fully repair the harm that was caused, most reparations measures (however concrete) will be symbolic.



- *How to ensure that procedures for claiming and receiving reparation do not constitute or contribute to a secondary victimisation of beneficiaries?* The reparation process should be designed to restore the dignity of survivors, not to further alienate or traumatise them.
- *How to secure assets:* This will depend on the nature of the assets (victim assets or property, assets belonging to a judgment/debtor or a criminal defendant in respect of proceeds of crime) as well as the purpose for the asset recovery - to restitute stolen assets, to compensate beneficiaries for their losses, or to ensure that perpetrators do not benefit illegally from their crimes. The key to improving enforcement efforts is to ensure courts have adequate information about the financial circumstances of defendants. Information about assets and about the defendant's likely strategies regarding dissipation/relocation of assets is key to any successful enforcement action.

## B. The Sessions

### Session I: Opening Session (Alan Stephens, Steven van Hoogstraten, Clemens Nathan)

**Alan Stephens**, Director of Research at the Clemens Nathan Research Centre welcomed the participants and provided an overview of the Conference programme. He mentioned that today's victims of war crimes, crimes against humanity and genocide could benefit from a dialogue with a range of persons who have been involved with securing reparations for the survivors of the Nazi Holocaust. **Steven van Hoogstraten**, of the Carnegie Foundation of The Hague, welcomed the participants to the Peace Palace. He spoke of the longstanding history of the Peace Palace in the dissemination of international law, and underscored the

relevance of the Conference to the ethos of the Peace Palace.

**Clemens Nathan**, Founder and Chairman of the Clemens Nathan Research Centre, opened with a presentation on the relevance of post-Holocaust experience. He spoke of the late René Cassin, who inspired him to use the experience of The Holocaust for the benefit of mankind in general. Mr. Nathan underscored the importance of remembering that any form of reparation cannot overcome the suffering of the individual - no amount of material reparation can heal the psychological scars which remain indelible on those who have been abused and traumatised. The challenge to help survivors is extremely important.

Mr Nathan encouraged the participants of the Conference to consider whether compensation is illusory or can really be effective, and the practicalities of compensation versus the idealism which we all have for it. He further questioned how far compensation for second and third generations should be considered and where to draw the line between welfare and compensation. He reminded the participants of the major concentration camps which were liberated after the Second World War, in which thousands of people died in the first few days in each one because of inappropriate food, or no food at all. Mr. Nathan also addressed the fact that for many countries, reparation is a low priority compared, for example, to climate change or armaments. Is it possible to change the attitude of people and therefore ultimately governments in democratic states to help with this on a large scale?

Mr. Nathan explained that the unique experience of the Claims Conference is that they have had 60 years of experience since the Second World War in looking at, negotiating and settling countless claims, together with the World Restitution Organisation, for Jewish victims of gross violation of human rights when over 6 million Jews were exterminated, including 1.5 million children. He reminded, however, that their achievements are nowhere near sufficient to alleviate the suffering of those still alive. He noted that: *“every year when some of us attend the Board Meetings we come back shattered by the new tragedies which confront us and make us realise how the pattern of suffering has continued for many of*

these people, who at least were not killed, over this whole span of time. Suffering just does not go away.”



Alan Stephens, Gideon Taylor, Clemens Nathan, Greg Schneider

## Session II: The Claims Conference Experience (Gideon Taylor, Greg Schneider)

**Gideon Taylor**, Executive Vice President of the Conference of Jewish Material Claims against Germany since 1999 provided an overview of the work of the Claims Conference.

Mr. Taylor began by discussing terminology. For the word ‘reparations’ the Germans use the term *Wiedergutmachung* (to make whole), though this term has never been adopted by Jewish victims. It is interesting that the victims and the perpetrators still do not use the same terminology to describe what it is that brought together some meeting of the minds on a way to try and provide some form of symbolic redress.

He explained that the Claims Conference was established in 1951 and brought together 23 Jewish organisations from the United States and around the world and also Israel. The negotiations began in 1951 and covered compensation and claims for stolen assets. The Luxemburg agreements of 1952 were made up of two parallel agreements, one between

Germany and the Claims Conference and the other between Germany and Israel. This was quite remarkable in historical, legal and jurisprudential terms as the states involved, Israel and the Federal Republic of Germany did not exist at the time of the events, nor did the Claims Conference.

The original *Wiedergutmachung* was \$56bn in nominal terms, and more recently the 1980 hardship fund was \$800 million, the pension programme that arose out of German reunification was \$2bn, the slave labour fund was \$1.4bn, the Swiss bank settlement was \$1.25bn.

Mr Taylor spoke about the importance of what is sometimes called ‘the restitution of history;’ the beneficiaries of the programme care deeply about how the history of what happened to them is represented. The first issue of importance was the places, where the events happened. For example with the slave labour fund there were 250,000 applications and 700,000 separate places of persecution. However the forms included misspellings and spellings in different languages which had to be administered in a database to provide accurate places and dates of persecution. This was important both for the processing of claims and for history. The second issue was documentation and third, the issue of history itself. Here, Mr Taylor spoke about research into the Nazi programme of pseudo-medical experiments. The research commenced in 2000 as part of a settlement with the German Government and German industry. The testimony of the victims of these experiments leaves an important historical legacy.

Mr Taylor also spoke about the benefits of these programmes on the survivors and indicated that educating future generations is an essential component of this work. He noted, by way of example, that individual case histories were placed on the website describing the place of persecution, the dates and the description of the events.

**Greg Schneider**, Chief Operating Officer of the Claims Conference, spoke about some of the practical aspects relating to the Claims Conference’s work, and lessons that have been learned over the years.

Mr. Schneider indicated that it is crucial to begin with an end in mind from a practical perspective, for example to clearly understand and define what the completion of the programme entails. For instance, it is important to decide what will be done with the collected materials. Unless you consider from the beginning how the programme is going to end and every aspect that needs to be accounted for then mistakes will occur at the beginning that will be paid for throughout the entire process.

He also underscored the importance of understanding technical principles regarding payment of claims. In particular, if payments will be made, one must understand clearly how they are to be made (cheques, wire transfers, in person, through third parties...).



Greg Schneider, Saul Kagan, Sheri Reig

Mr. Schneider underscored that the whole process is about making the inhumane, humane.

*To have someone fill out a form as if you are going to the department of motor vehicles to say I was here and this and this happened is to miss the point because what you are asking for in these forms is for people to relive the worst nightmares that we can't even imagine and to fill out a form about the death of family members or about torture but to do it within the boxes and in three pages and to give the right information in a way it can be dealt with.*

During this inherently inhumane process, making them relive the trauma again, it is incumbent upon us to be cognisant of all the emotional triggers along the way. For example

as an administrator one could ask a question that seem perfectly coherent but which turns out to be such an emotional issue for the person filling out the form. Restoring dignity is a major issue throughout the process, as is avoiding further traumatisation.

For some people the process can be about the money but mostly it is not. Money can never make up for what happened or what was taken away. Instead, the process is chiefly about validation of their experience; it is about someone acknowledging what happened to them and making a symbolic gesture.

Mr Schneider listed eight rules of claims processing:

### 1. Outreach

- a. Direct mail was used for the slave labour programme which was possible as the Claims Conference knew most of the clients. This included information packs and application forms.
- b. We also advertised in newspapers in 26 countries and 17 languages.
- c. A call centre and website was set up. Any way possible to get information to people was used.
- d. Organisational outreach - the help of 1750 organisations was engaged and 300 help centres were established.

We tried to be as creative as possible, because finding the people who were potentially eligible was as important as anything else along the way. This is because of how it helps to restore dignity in people who previously felt overlooked and ignored.

*The idea that a programme is set up but that it does not do enough outreach reinforces the idea that these people are invisible.*

We tried to be creative about where to advertise the programme, considering where Holocaust survivors would go, which often would have nothing to do with their history. For example, for the elderly people of Israel they made the application forms available in every post office.

### 2. Communication

Communication is about restoring dignity.

*We have a goal with the slave labour programme that with each applicant we would be in contact with them at least every 90 days. Often even the claim had not progressed and further something was sent out to say it was still being worked on. They deserve this dignity of knowing that they have not been forgotten or overlooked.*

With the design of the application form the idea was again to be as humane as possible. One of the issues was whether email should be used as it was thought that most elderly people would not use it but it turned out that more than 20% did. However they decided against integrating the database with telephone systems to save the victim from having to give details, because it was too expensive. However phone calls were logged so that when other operators answered calls weeks later they would understand previous issues with the claim.

### **3. Expectation**

It was emphasised that any payment would be symbolic, that it was more about recognition. This was because going into the process thinking that some large payout would come and then not receiving it would be devastating for the victims.

### **4. Fairness**

In these programmes we are balancing individual justice with 'rough' justice. Individual justice means identifying the type of experience the person had, for example the duration, the place, the kind of suffering, and connecting that to a payment. This could mean receiving \$150 for every month that a person was in a concentration camp, and then working out the total payment. Rough justice reflects the reality that there are insufficient funds to compensate an Auschwitz survivor, even if it was just for one day. So a symbolic payment is required; anyone that was in a concentration camp for however long receives a specified amount. This is much more manageable administratively because it is only needed to be proved that a person was in the camp and not the particular length of time in which they

were detained, which becomes more complicated.

### **5. Process**

There must be a fair and transparent process, which can mean a number of things:

- a. Public hearings and/or opportunities for victims and others to provide input is very important.
- b. The rules for who is eligible should be clear and made accessible to all persons who may potentially be eligible.
- c. There should be an independent appeals process.

### **6. Participation - involvement of the victims**

- a. The victims should be the main component of the negotiating delegation (e.g., Holocaust survivors).
- b. In every community we have local advisory committees made up of Holocaust survivors in order to facilitate their engagement.
- c. The use of ombudsmen or similar independent structures can be very important, particularly for outreach because victims can be distrustful of the system, of being on lists, of being assigned registration numbers and so other victims are able to help in the outreach process and relate to their peers in a way that administrators can not.
- d. It is also helpful to make victims part of the process because at some point there are invariably people to whom you have to say 'no.' It is much easier to hear the 'no' from a fellow victim rather than from an administrator. When the administrator comes to deliver the bad news with a victim it helps people to understand that there is a framework.
- e. Specialist knowledge that victims possess can be particularly helpful in reviewing evidence.

### **7. Efficiency**

- a. Technology has significantly assisted the Claims Conference to be accessible to the victims.
- b. Technology also helps pull together statistics quickly which helps to monitor how many claims are being processed per day and how many applications are left to process. This gives the managers an indication of how much longer the process will take and helps plan budgets.

#### **8. Moral Basis**

- a. With each payment that the Claims Conference receives comes an acknowledgment, effectively an apology that is passed on to each individual.
- b. For many this is just as important as getting the money.

#### **Questions and Answers from Panel II**

**One participant** asked about the type of criteria the Claims Conference used to establish which groups and which persons fell within a particular framework, and asked how the criteria were decided upon. The participant indicated that as a lawyer representing a number of victims in the Dutch courts, her difficulty is that she is not a participant in any 'Claims Conference,' she has no money to give to the victims, it is up to the Dutch courts and they are not set up for such large numbers of victims.

**Gideon Taylor** replied that in a phase where there is a trial or a negotiation, these often include set criteria. Then stage two starts where people sit down and try to implement or apply the criteria to specific sets of facts. What they have found overwhelmingly is that by separating these phases you end up creating a system that is often totally impractical, expensive or just impossible to implement. He indicated that in any given process like the ones that were mentioned, at the beginning, one must think right through to the end of the process, not just to consider whether the criteria are fair but also that they are administratively feasible. He provided the example of the slave labour programme - one had to decide whether the awards should be structured in terms of how long someone was

held in a camp or should it be one flat sum? This type of determination carries with it one set of moral issues: if it is compensation, it should distinguish between the type of camp and the length of stay. On the other hand if it is understood as symbolic, as was ultimately decided, then a flat amount can be more justifiable.

Mr Taylor indicated that they found that using a system that tries to accurately quantify the losses would cause administrative costs to rise considerably and the feasibility of obtaining accurate and verifiable evidence would remain very low. Often the documentation they could find to confirm a person's presence at a particular camp did not mention the length of the stay. Mr Taylor's overall comment was that one had to think beyond what is fair, just, and right but to the practicalities of how it can be implemented.

The Claims Conference is in a unique position in that it is both the negotiator and the implementor. In most other situations this will not be the case. Instead, there might be a team of lawyers who are not experienced in distribution doing the negotiation and this may cause problems with the eventual administration of the disbursement. For example, there could be 15 different heirs to a claim living in many different countries, so which country's laws does one use to distribute the claim? Suddenly the administration of a claim costs more than it is worth so one might decide to only distribute to children or grandchildren. Mr Taylor urged the Conference participants involved in such negotiations to talk to people who do processing before an agreement is reached, because no one will want to re-open agreements for administrative reasons.

**Another participant** asked about the relationship between lawyers' fees and the amount received by victims themselves. The participant also queried whether the trauma had been transferred to next generations, the children of the survivors.

**Mr. Taylor** pointed out that the class action suits in the United States were separate from the Claims Conference's negotiations but that even though the lawyers were paid large sums of money the fact remains that that system also

has positive aspects in that it allows class actions to be filed when most European courts do not.

With regard to the second issue of trauma being past on to children, Mr. Taylor noted that the Claims Conference has long acknowledged the reality that it could negotiate for the survivors and for property that was recovered but that it was not feasible for it to negotiate for children and the 2<sup>nd</sup> and the 3<sup>rd</sup> generations.

### Session III: International Principles and Practice of Reparation (Carla Ferstman, Judge E. Odio Benito, Professor Theo van Boven)

**Carla Ferstman**, Director of REDRESS introduced the panel by noting the important roles that both panelists continue to play in the area of reparations for victims of the most odious crimes.

**Judge E. Odio Benito**, Judge at the International Criminal Court, provided an overview of the ICC's approach to reparation for victims.



Judge Odio Benito

Judge Odio Benito began by noting that the ICC is in its early stages and underscored the importance of learning from past experiences

especially the Claims Conference. She provided the historical background to the ICC and noted that aside from the post-Holocaust experience, never have the victims of genocide, crimes against humanity and war crimes, especially women, had a voice in international criminal justice systems to get recognition for what happen to them and to obtain reparations.

When the Rome Statute was adopted in 1998, the ad hoc tribunals for Rwanda and the former Yugoslavia had already operated for a number of years and prior to this, international criminal procedures were limited to the prosecution of perpetrators having no consideration for victims beyond their role as witnesses. Research into the Yugoslav Tribunal has found that it has been insufficient for the victims and their families; no one has helped them economically, or offered an apology much less compensation or rehabilitation. Victims have been neglected, and the victims of the Rwandan genocide have suffered the same fate. This appalling fact led the drafters of the Rome Statute to include in its provisions the rights of victims to receive protection, participate in the proceedings and receive reparations. She indicated that *“Making these provisions a reality for the thousands of victims remains our biggest challenge.”*

Judge Odio Benito went on to discuss the concept of victims in the Rome Statute, as defined by rule 85 of the Rules of Procedure and Evidence: A victim is *“a person who has suffered harm as a result of a commission of any crime within the jurisdiction of the court.”* She noted that despite the apparent clarity of this definition, its application in court proceedings will require a detailed analysis and judges will have to examine this definition in light of concrete situations and cases before the Court.

She also noted that the concept of harm would need to be defined. The Pre-trial Chamber has already adopted a two-tiered concept of ‘victims of a case’ and ‘victims of a situation,’ in relation to their participation in the proceedings, even though there is one general concept of victims in rule 85.

Judge Odio Benito explained that the ICC system also protects the interests of different groups of victims that must be given special attention, and their particularities taken into

account when granting reparations. Rule 86 states that the needs of all victims must be taken into account. She emphasised that though the ICC statute refers to certain groups of victims that require special attention, their vulnerability should under no circumstance be considered as an intrinsic weakness but resulting from the discriminatory context of society in which they developed. Bearing this in mind, the Court must consider the right to protection and rehabilitation as well as the right to proactively participate in the judicial process and in the implementation of subsequent reparation orders.

Article 75 creates a mandate for judges to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. To this date this provision has not been applied in relation to a case as no victims have applied for reparations and the Court has not established any principles on reparations. The principles upon which the judges will determine the scope and extent of any damage, loss or injury to or in respect of victims, might include the universal principle of non-discrimination or the principle of proportionality between the harm suffered and the reparation granted and the cost for the perpetrator. She also notes that before making a reparations order the judges may invite and may take into account the points of view of the convicted person, the victims and any other interested persons or states.

Since state cooperation is indispensable for the effective enforcement of reparation orders, their participation in the reparation proceedings is essential. The Statute also clearly establishes that no decision of the court shall be interpreted as prejudicial to the rights of victims under national or international law.

Substantive and procedural provisions on reparations are contained in the Rome Statute, the Rules of Procedure and Evidence and the Regulations for the Trust Fund of Victims. However, in light of Article 21 of the Statute, judges may refer to and apply other sources of law that could prove to be of great benefit. Some of these could be soft law instruments. This could be useful for future determinations such as the establishment of the principles of reparation upon which the Court will act.

Likewise the extensive case law of the inter-American Court of Human Rights which has defined crucial concepts such as the moral dimensions of a 'life plan,' and has interpreted the right to receive reparations taking into account the particularities of groups and communities such as indigenous groups, could usefully assist the future judicial work of the ICC.

Judge Odio Benito noted that the ICC can award individual and/or collective reparations, and underscored that in doing so the Court should take into account the scope and extent of any damage, loss and injury. The ICC judges will need to explore the pros and cons of different forms of reparations in order to successfully respond to the needs of victims. As the ICC will deal mainly with mass crimes which will involve a great number of victims, a policy issue arises and the Court will have to decide how to award individual compensation on a fair and equal basis. This could lead to some difficulties in practice, for example when the convicted person is indigent. The Court may also grant collective reparations designed for widespread recognition of victims, for example of a given situation or a type of crime.

The Trust Fund for Victims is a fundamental part of the ICC reparations system though it is independent from the Court. The ICC Statute only asserts that the Court can make contributions to the trust fund by way of reparations, fines and forfeitures and orders that awards for reparations are made through the trust fund.

The trust fund has the autonomous power to grant assistance to victims even before the trial chamber has rendered a judgment. This power will nevertheless be subject to the Court's approval taking into account the principles of the presumption of innocence and the rights of the accused to a fair and impartial trial.

Judge Odio Benito then moved on to discuss the importance of states and the international community in the ICC system. The domestic legal systems of states parties and also non-states parties are relevant to the principle of complementarity. Implementation of the provisions of the Rome Statute includes the incorporation of international crimes in national law and other mechanisms foreseen in the

Statute. National implementation of the ICC Statute should also include all of the provisions related to the right of the victims to receive protection, to participate in proceedings and to obtain reparations.

Lastly Judge Odio Benito highlighted the importance of advising victims of their rights under the ICC Statute. She noted that the Court alone will not be able to fulfil all the expectations - it will require a trust fund that is economically and politically strong, it will require that states cooperate with the Court and it will need the force, the advice and the support of people that understand that the determination of tribunals and especially international criminal tribunals is to bring justice for all, a justice that punishes but also a justice that restores.

**Professor Theo Van Boven**, Independent Expert on the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of Human Rights and Serious Violations of Humanitarian Law (the Basic Principles and Guidelines), spoke to their background and drafting history. He began by mentioning the case against Serbia brought by Bosnia at the International Court of Justice.<sup>3</sup> He noted that what is interesting and also disturbing to some extent, is that those who have been suffering from these hostilities were not here in the Peace Place but were outside demonstrating at the gate. That illustrates, in many ways the position of the victims. The International Court of Justice functions on the basis of traditional international law, where the question of state responsibility is seen as an inter-state matter. In the past, reparations in international law were largely a matter of inter-state affairs and not of those immediately concerned.



Professor Theo van Boven

War-time reparations were sometimes imposed on the losing party. The question of state responsibility has undergone certain changes since the development of human rights law, nevertheless, when these Basic Principles and Guidelines were discussed and put to a vote certain delegations, for example, Germany, argued that state responsibility could not be seen as a basis for them. They still refer to state responsibility as an inter-state issue and also the International Law Commission's articles on state responsibility are largely based on inter-state relationships.

It is interesting to see that the emergence of human rights under international law has altered the traditional state responsibility concept, which focused on the state as a medium of compensation. The integration of human rights into state responsibility has removed the procedural limitation that victims of war could seek compensation only through their own governments and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to states but to individuals based on state responsibility. Moreover there is a clear trend in international law to recognise the victim's right to compensation, to recover from the individual who caused the injury.'

Prof. Van Boven moved on to discuss the 'largely neglected' victims' perspective. He referred to the Commission of Inquiry for Darfur, which made two main recommendations. One was to refer the issue of criminal accountability to the International Criminal Court. The other, which has been ignored, was for the establishment of a compensation commission. The Security Council only endorsed the first recommendation but not

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<sup>3</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) - Judgment of 26 February 2007, available online at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&PHPSESSID=9667f55d208bd03549dd0adc8038be9d&case=91&code=bhy&p3=4>.



the second. So again the issue was largely focused on the perpetrators but not, in the Security Council's perception, on the victims.

Nevertheless Prof. Van Boven also noted the positive developments from neglect towards recognition. In international human rights treaties, victims may have the right to petition international judicial and quasi-judicial bodies. He also noted the progress of the ICC Statute in recognising the victim's own standing and the right to reparation, which when compared with the other tribunals, is an important step forward.

The reason for drawing up the Basic Principles and Guidelines was that in the late 1980's, the United Nations had entered a new phase, the Cold War had ended, Stalinist repression was basically over. Also, there was a broad movement towards recognising the rights of victims and this movement was supported strongly by the Latin American countries in particular who played a decisive role in the adoption of these Basic Principles and Guidelines. Chile played a particularly important role, as did certain European and African countries to an extent.

Prof. Van Boven indicated that there had been a great deal of debate at the UN on whether the Basic Principles and Guidelines should include both gross violations of human rights law and also international humanitarian law. There were some countries, notably the United States, which wanted to have two separate documents, one on international human rights law and one on international humanitarian law. In the end the view prevailed that violations of human rights law and of humanitarian law are often in the same area so it is often difficult to draw a distinction. Also the International Court of Justice ruled on several occasions that the two are very complimentary and sometimes cover the same areas. Finally the United States joined this consensus on the document.

The Basic Principles and Guidelines are not a treaty. They do not have to be signed or ratified; they are what is sometimes referred to as 'soft law.' This does not mean that they do not have authority, in the explanation of the votes of many delegations it was emphasised that the Basic Principles and Guidelines 'do not

entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law, which are complementary though different as to their norms.'<sup>4</sup> The Basic Principles and Guidelines, can however be viewed as declaratory.

Another issue that was discussed in the drafting process, over many years, was the inclusion of the word 'gross.' Legally speaking any violation of human rights should give rise to reparations. There was a concern that to limit the Basic Principles and Guidelines to gross violations would undermine the broader principle. There is no international definition of what is a gross violation but we may soon find that at least the crimes under the jurisdiction of the ICC certainly are violations of a gross nature. It can be both an advantage and a disadvantage to have a definition. It can have a limiting effect. It was also discussed whether gross violations of economic and social rights could fall under the definition. Prof. Van Boven indicated that he thought that deliberate, systematic and large scale violations of economic and social rights may amount to gross violations of human rights and serious violations of humanitarian law. In crisis, like the one we witness in Darfur, the systematic burning of houses and villages, the forced displacement of the population, the starvation caused by the restrictions on the delivery of humanitarian assistance, and the destruction of food crops are deliberately used along with other gross violations of human rights such as murder and rape as instruments of war. Therefore, according to Prof. van Boven, he would not necessarily limit the violations of human rights in terms of the mandate of the jurisdiction of the ICC.

Another issue was defining victims. The ICC has been struggling with this issue already - if you deal with situations of large and gross violations of human rights, the numbers of victims are inevitably extremely large, how are you going to cope with them, materially and in other ways? One of the main challenges, that the ICC and others will face, is where to draw the line

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<sup>4</sup> Preamble, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

of demarcation. In the discussions on the draft Basic Principles and Guidelines there was a big debate on victims and there were many voices that were contradictory, so the common UN fix of relying on an earlier text was adopted. The definition of victims which was already included and accepted was from the 1985 declaration.<sup>5</sup>

It is clear that we do not only think in terms of individuals but also of collectivities, this is made clear in the preamble. There are direct victims but also indirect victims, for example family members. There is in addition to the question of physical harm, mental harm, and trauma carrying on from one generation to another.

With regard to the form of reparations the Basic Principles and Guidelines are both important and interesting. They include restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition which are more controversial. I have seen victims that were asking to be acknowledged, to know the truth; they were not interested so much in the monetary aspect. So the moral basis is important.

As lawyers we look at these Basic Principles and Guidelines and think of litigation, but they are mainly meant for governments in order to implement them in reparation programmes and in legislation. Even when these Basic Principles and Guidelines were in a stage of preparation they were already used as a model for legislation, for example in Argentina, Chile and other Latin American countries. They were also referred to by the Inter-American Court, which has accomplished more on reparations than the European court because the basis for reparations in the Inter-American Convention is much stronger than in the European Convention. The Basic Principles and Guidelines also played a decisive role in the drafting process of the ICC Statute, where similar notions have been included.

In closing Prof. Van Boven indicated that there are systems in place and systems in the making for dealing with reparations for victims of international crimes. With regard to systems in place, we have a normative system which is

largely in place but the implementation is still lacking, there is still a long way to go with systems in the making.

## Questions and discussion - Morning Sessions

Prior to turning to the Conference participants, the morning panellists were providing the opportunity to comment. **Gideon Taylor** noted that he is a lawyer by training and worked in academia and legal practice for some time before moving to the political and administrative worlds and what the presentations had brought out was both the tensions and the symbiosis between the law and the practical. One of the big challenges will be how to think not only in legal terms but also in practical terms. As the ICC shapes its concepts and ideas it will need to think through to the end of the process and incorporate what is practical into the legal framework. The issue of the definition of the victim is certainly an issue that the Claims Conference had faced; it is not enough to define who will be eligible for payments and should be eligible from the point of view of justice and fairness. The victim has to be defined in terms of what is practical also.

**Greg Schneider** indicated that he was very fearful of addressing the issue of defining victimhood.

*We can define through criteria, who is eligible for a particular compensation programme but that is different to defining who is a victim. You could have a victim who is not eligible for a particular compensation programme. Particularly in our context where we have many different programmes it is a point we make over and over that eligibility for a particular programme does not define victimhood. It is far too emotionally charged for us to start determining who is a victim.*

**Judge Odio Benito**, responding to questions from the floor, indicated that anonymity is a protective measure requested normally by the

<sup>5</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

parties, and is not meant to be an obstacle to the proceedings. The measures are meant to protect victims and not restrict them from participating.

**Prof. Van Boven** indicated, in respect of Darfur, that non-cooperation has again been confirmed yesterday by Sudan. The main point is of course in all these issues, justice is primarily done at the domestic level, both criminal justice and reparative justice. When no justice is being done at the domestic level and there is no chance for it, then the ICC should come in. Sudan has argued that there is no need for the ICC as its national courts are dealing with the crimes. The Prosecutor, in examining and analysing domestic justice in Sudan, has come to the conclusion that little can be expected from the national justice system.

Why is it that Germany was prepared after the Second World War to issue the *Wiedergutmachung*? I think they wanted to become an honourable member of the European community and this was a condition. Normally states are not so interested in the victims; what is decisive are the political forces. You need legal institutions but for the enforcement the political forces are what matters. That is why I am not very optimistic for the hundred of thousands of victims in Sudan unless the political forces change. The referral to the ICC by the international community occurred because it was not prepared to take action itself.

**Gideon Taylor** commented further that what the Claims Conference has experienced is very much looking at these issues from a collective basis. It is obviously a messy business; one descends from the higher level of the victim and the theoretical arguments of who is a victim and the general definition. The challenge of the Claims Conference is that we are the place where morality meets money. It is not an easy place to be because you are now coming from the place of a person who is a victim, something special, something that we as a collective group want to honour and cherish. Then we reach reality - we have an article 2 pension programme, the criteria we negotiated with the German Government included a certain requirement of persecution so the decision was that the programme would be

limited to those who were in a concentration camp for six months. That means the person who was there for five or five and a half months is not eligible. You come to the hard reality of deadlines, dates and periods, and then you come to the even more challenging decisions, not of duration but of the extent of the persecution. You have to determine whether a particular place was a category 'a' or 'b' facility in terms of violence, so we sat down with the Germans and survivors and we were arguing the morality of these incomprehensible events that took place in terms of category 'a' or 'b'. This comes back to Greg's point that of course a person is a victim but they may not be eligible for a particular programme. It is a lot messier, harder and uglier and there is a lot more pain and suffering when one gets to the point of a solution and distributing the money. Fighting and struggling for the money, however difficult it is, is far easier, far more morally clear than when it comes to distribution. In the discussions for the programme for the victims of slave labour we were in a grouping together with east European governments that were representing non-Jewish victims but their historical experiences were very different. So we came to a settlement that covered people that were forced to work, but that covered those who, at one extreme a person who was in Auschwitz, taken to a concentration camp and subject to the programme of destruction through work and at the other end (not wanting to really use a spectrum) could be a non-Jewish Pole taken to Germany to forcibly work on a farm, and after a few years went back to his country. They all came under the same umbrella in this agreement. We were in the negotiation and we were arguing on the one hand with Germany over the settlement but on the other hand we were sitting at the table with people who were representing very different groupings with very different persecution experiences. That is not saying there was not a very different range within the Jewish experience.

How do you balance this? Again it is both moral, (how do you do what is right, just and proper), and how do you do what is practical. Perhaps morality would mean having 20 different degrees of persecution and trying to come up with 20 different compensation systems with their own definitions, or do you say that everybody is the same? The solution was rather

like making a sausage - we came up with two categories: those we called slave labour and those we called forced labour. Those who were defined as slave labour were those in concentration camps and ghettos and were forced to work. Forced labour meant other people who were forced to work but were not in camps or ghettos. The slave labour payment was DM 15,000 and the forced labour was DM 5,000. The challenge the ICC will face is not to be reactive but to be proactive in the conceptualisation of the scope of people to include and what is practical. The end result must be one that is just and practical.

**Prof Van Boven** indicated that with regard to refugees, the Office of the High Commissioner for Refugees' mandate does not extend to criminal justice, however they work to facilitate the voluntary return of refugees to their homes, and in this respect it is important that these refugees recuperate their homes and lands. Here, the UNHCR has a role to facilitate and to encourage the return of refugees' property and lands as a form of restitution.

In response to a question on responsibility to afford reparations for the victims of the Rwandan genocide, **Prof. Van Boven** noted that we may find some interesting elements in the judgment this week of the International Court of Justice<sup>6</sup> because the ICJ indicated in its recent decision on Serbia that although Serbia is not responsible for genocide, it did on the other hand violate the Genocide Convention because it could have been instrumental in preventing it. So you could argue, very well that those powers and institutions like the United Nations, like France, like Belgium and others that were present then and even withdrew their troops, they were in a position to prevent the genocide in Rwanda. There were all sorts of early warning signals, so somehow these actors carry an important international responsibility. Can you though go one step further and say Kofi Annan, who was at the time in charge of peacekeeping and acknowledged that the UN failed, bears some kind of legal responsibility? Also, what form should the reparations come in for the irreparable wrongs that were done? Prof. Van

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<sup>6</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) - Judgment of 26 February 2007.

Boven posited that the international community has not done enough to live up to its obligations under international law.

**Judge Odio Benito**, commenting on the impact of the ICC system of victim participation and reparation on defendants' fair trial rights, notes that it will be the day to day work for trial judges to balance the rights of the accused with the participation rights of victims.

**Prof. Van Boven**, commenting on the drafting of the Basic Principles and Guidelines and the debates on the inclusion of international humanitarian law, noted that the United States' arguments were very formal. They said that as the Basic Principles and Guidelines was an instrument of international human rights law prepared in the Commission on Human Rights, this is not the right body to draft an instrument that has effect on international humanitarian law. However, just one or two years ago, there was a protocol on children in armed conflict that came from the Commission on Human Rights. In the end they dropped this request and did not even repeat it in a statement when the document was adopted in the General Assembly.

## Session IV: Understanding the Particularity of Victims' Experiences (André Laperrière, Dr Irfanka Pasagic, Dr Esther Mujawayo, Dr Yael Danieli, Ms. Vahida Nainar)

The session was chaired by **André Laperrière**, the Executive Director of the Secretariat of the ICC's Trust Fund for Victims. At the opening of this panel, Alan Stephens read out the statement of **Dr. Irfanka Pasagic**, from Bosnia and Herzegovina, who was not able to come at the last minute as a result of the anguish of the many victims she counsels following on from the decision of the International Court of Justice (Bosnia and Herzegovina vs. Serbia and Montenegro).

**Dr. Irfanka Pasagic** noted as follows:

*“survivors, rushing these days into my office having lost even the ultimate hope that the world will confess the horrible crime committed upon them and clearly name the responsible ones, have definitely made me decide not to come to the Hague. I think it is here where I am needed more.*

*Already for two days, throughout the scaffold of Bosnia and Herzegovina, the criminals celebrate. The victims have lost, even this time. Only emptiness fills me out; I feel it so painfully. I wish you successful work.”*

**Dr. Esther Mujawayo**, a survivor of the 1994 Rwandan genocide, noted that:

*“In early July 1994, nearly one hundred days after the start of the genocide, those of us who were still alive, had survived. We did not think how lucky we were, but that we were condemned to live.*

*During the next three months many were to beg the killers to kill them as well, often this was refused. There were very old women, who had had their families, their children and grandchildren, killed in front of them. When they asked to be killed also, they were told that they would die - would die mad. Many of the women who had been raped have begged the rapists to kill them. I remember one of my patients told me, the soldier who raped her, said he was not killing her - the death I'm giving you is worse - at the time she didn't realise what he meant. It was only later, when she started to see that she was sick and was dying that she understood what the man meant.*

*For most of the survivors, they survive but there is no body left, they are empty. Who are you when your entire family, husband, parents, siblings, aunts, uncles and nephews and nieces, are killed? I have to admit that at least I was lucky, I still had my children but many of my friends did not. This is an effective emptiness, a fear that you would lose what little sanity you had left. I remember something nearly made me go crazy, when I tried to go back to*

*my parents' home I could not find it, there was no road there any more.*

*I can not say how I survived without a single machete, I have no wounds, but many of my friends were left for dead. Now thirteen years later there are many survivors dealing with the wounds that have still not been treated. When we did a survey in the widows' organisation we found that nearly 80% of the surviving women had been raped, and more than half were infected with AIDS. Many of the survivors have died since, for example, the person to whom I dedicated my book, was fourteen during the attacks and she died at the age of nineteen, at the time we could not afford the AIDS medication.*



Luc Walley and Esther Mujawayo

*The irony, when we are discussing reparations for victims, is that the persons who raped her, the people convicted at the ICTR in Arusha, were given medication from the UN so that they could stay alive and be processed. When we encourage women to talk about what happened, the shame must not be on us, the shame must be on the perpetrators. We get some success because at least the rape has been recognised at the ICTR as a first category offence but then this girl died - the ICTR told us that it is not a hospital. There was no provision for victims when the ICTR was decided in New York. All that was there was ways to keep the perpetrators alive, but the victims continued to die.*

*The wounds that victims have that are not visible are worse than those that are visible - an amputated arm can get sympathy, but working as a therapist I often see that the*

*invisible wounds, those that cannot be expressed, are the most difficult. Many people alive today are living with the trauma of what they saw, heard, smelled and underwent and it is still there hurting. People also have to live with the guilt that they have not been able to bury their families. Many of the survivors struggle to give back to the dead their humanity. In Rwanda, in addition to the killings and destruction, the whole society has been broken, the values have been totally broken. This picture is very relevant to reparations, as we must see what it is that we are repairing and rebuilding. This must include the values of society.*

*With regard to compensation and reparations I think that no compensation is possible; Nothing. Even justice is not possible. This does not mean we should forget, we have to try, even with small things. For that we have to have reparations and justice, even if it never has the same value of my family, I am still alive and want to be alive."*

**Dr. Mujawayo** went on to mention the situations of a number of vulnerable groups. She referred to children that are the heads of households; there are many families who do not know what a parent is - these are children leading children, children that are having to live with their own trauma while at the same time have taken on the responsibility for feeding their brothers and sisters; They have never been to school. This is a big group. How can we let all these children lose their childhood? What is the future if nothing is done for these children? Access to medication in Rwanda is improving for many women, but they are still homeless, and something must be done for this. In Rwanda there is no social security, so one must rely on one's children in older age; so who is now taking care of the elderly people?

One of the most vulnerable groups is the women and even young girls that were raped, that had children. These children are now twelve years old, and bear the faces of the rapists, the rapists that killed the mothers' families. So the mother and child are living in this poverty and difficult situation with the stigma. The mothers are being stigmatised but also the children are being called killers themselves because of their fathers.

These are the consequences of the violence, they are not enormous, we are talking about a maximum of 300,000 people, their needs are not so huge, but like they were forgotten during the genocide they are being forgotten now. Ms. Mujawajo indicated that the responsibility to repair was not being taken seriously. Since 1998, the victims asked the Government of Rwanda to establish a fund for assisting those who are vulnerable. It is still a drop in the ocean because up to now housing is still a problem, but this fund cannot resolve it. One of the big achievements of the fund that we decided early on was the payment of all secondary school fees; but still children ask for school uniforms and for higher education. There was also a desire to tackle the medical side, but with AIDS, they had to forget it straight away because the antiretroviral drugs would have taken up the entire fund. They also collected money for an operation in Belgium for a victim that had her back broken in the violence. Now, after 12 years this person can walk again. She used this as an example to say that although it is true that no compensation is possible to make up for the violence, there are actions that are possible and these are very valuable.

Ms. Mujawayo indicated that she came to the Conference with hope and to challenge the good will of the participants. *"You are all important people, lawyers etc. please help us with your knowledge, your capacity and with your strength. Thirteen, fifty years later I do not want to see reparations that came when it was too late, it should not be too late."*

**Dr Yael Danieli**, a clinical psychologist and traumatologist, Director of the Group Project for Holocaust Survivors and their Children, and Senior Representative to the UN, International Society for Traumatic Stress Studies, ISTSS, presented on how victims and professionals view the essential elements of healing.

Dr. Danieli spoke about the perceptions and attitudes that many members of the public have had toward survivors of the Holocaust, including myths that the survivors had in some way participated in their own fate or that they had performed immoral acts to survive. Survivors were told to get on with their lives. These ensured the survivors' silence, forcing

them to conclude that nobody cared. This *conspiracy of silence*, by many professionals as well, including justice professionals, was proved detrimental to the survivors, intensifying their mistrust of society and making reintegration and mourning impossible. The post-trauma events thus have the power to recreate, amplify, and sustain the trauma itself sometimes more dramatically than the original trauma. Dr. Danieli further elaborated on the multigenerational effects of the trauma and the *conspiracy of silence* on the offspring and discussed the absorption by children born *after the trauma* of their parent's Holocaust and other traumatic experiences.

She explained that cognitive recovery, what the person is conscious of, involves the ability to develop a realistic perspective of what happened and accepting this reality. For example what was and was not under the victim's control. Accepting the impersonality of events also removes the need to attribute personal guilt and causality. This puts the events into perspective and helps the victim form a view of humanity and themselves, as individuals, not based solely on the traumatising events. For example the fact that once someone was helpless, does not make them a helpless person.

Dr. Danieli then noted the views of the Latin American Institute of Mental Health and Human Rights - victims know that individual therapeutic intervention is not enough, they need to know that their society recognises what has happened to them. The Institute concluded that social reparations are simultaneously a socio-political and a psychological process. They aim to establish the truth of political repression and demand justice for the victims. The socio-political context must be healed for the full healing of the individuals and their families, as much as you need to heal individuals to heal the socio-political context.

Dr. Danieli discussed the interviews she carried out with victims of the Nazi Holocaust, the Armenian genocide, the Japanese internment in the United States during World War II, with Argentineans and Chileans and with professionals that have worked with these groups. She began by explaining the victim's perspective of the process of claiming reparations. German reparations were

experienced by survivors as an additional series of hardships. The laws issued by the allied forces merely ordered that property should be restored to its original owners and did not take into account personal damage to victims. The process itself was also traumatic as it inflicted indignities on the claimants while at the same time German authorities were elevated to the status of superior beings adjudicating on the claimants' honesty. The authorities behaved as if the claimants were trying to extort money from the German Government - victims had to prove that they had been damaged even if they were held in concentration camps. Bureaucratic deadlines were used to reject and delay claims. Psychological tests were needed to prove a claim, however the process was often so hard on the examiner that some victims were told, for example, not to discuss the events just their symptoms.

Dr Danieli quoted several survivors' experiences. Some of the issues which mark these experiences include:

- The disagreement between survivors about whether money should be taken or not. The symbolic relevance of an apology for acts that can never be compensated and the compensation as a financial necessity was discussed.
- The cultural differences of how wrongful acts are dealt with. For example, an American view that money is paid for damages vs. in Israel, idealists initially fought against taking money but later thought this was wrong because it left the money in German hands and would have great benefit for older persons with no family ties to support them financially.
- A monthly cheque can be better than a single payment, it in some way weakens the trauma and the routine helps to overcome survivors' guilt.
- A long-term approach must be taken. For example, in Chile and Argentina parents who lost their children are also robbed of the chance to be supported by their children in old age.

- With imprisoned children compensation should reflect the loss of education.



André Laperriere and Dr. Yael Danieli

Through mothers in Argentina, Dr. Danieli emphasised the most crucial aspect of removing impunity for the perpetrators. Japanese Americans felt finally vindicated after 50 years, having spent 10 years fighting the systems not as a Japanese-American issue but as an American constitutional one. It helped the victims talk about it and express deep seated emotional feelings for the first time in 50 years, even though there was only a token compensation but it was also a symbolic apology. Details of how it was paid became important as well.

The importance of commemorative rituals for healing the rupture between survivors and the rest of society is extremely important. The survivors experience commemorative events as a gesture of support. The pain is shared and the memory is preserved, the nation shares the terrible pain and survivors are not lonely in pain.

Education and monuments are important in aiding memory and in counteracting deniers and their destructive impact.

**Ms. Vahida Nainar**, currently an Adjunct Professor at International Women's Human Rights Law Clinic, City University of New York, and a human rights activist working on issues of gender, conflict and justice, discussed her work on a gender and reparations project fostered by

the organisation Rights and Democracy, as part of the Coalition for Women's Human Rights in Conflict Situations. The Study, which led to the adoption of the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*,<sup>7</sup> involves an analysis of post-conflict mechanisms for truth, justice and reconciliation, particularly the reparations recommendations emerging from such processes and their analysis from a gender perspective. The study was conducted in six post-conflict situations in different stages of establishment, functioning and implementation of truth and reconciliation commissions : Guatemala, Peru, Chile, Rwanda, Sierra Leone and Timor Leste.

Ms. Nainar explains that she went to these places for a period of one week to ten days and met with women victim survivors of human rights violations, sexual violence, women's rights and peace rights activists, indigenous women, commissioners, officials of justice processes and of reparation programmes as well as grassroots women. The objective of this process was to enhance the understanding of the gendered dimension of reparation policies.

The gendered dimensions of reparations policies refers to the analysis of the normative principles of patriarchal societies that create and shape gender identities and roles women and men are expected to play in society and the power imbalance arising out of them. The normative gender values of society, its reinforcement through the laws, the differential impact on women in non-conflict times, the exasperation of these impacts during wars and conflicts and the role it plays in women coping with the impacts in the post-conflict phase are critical to the understanding of the reparations for women victims and survivors of conflict.

This analysis needs to be recognised and taken into consideration in designing reparation policies to include a gender perspective in all aspects of the policy.

<sup>7</sup> The Declaration was adopted at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007, and is available here: [http://www.dd-rd.ca/site/what\\_we\\_do/index.php?id=2101&subsection=the\\_mes&subsubsection=theme\\_documents](http://www.dd-rd.ca/site/what_we_do/index.php?id=2101&subsection=the_mes&subsubsection=theme_documents).



The challenge of the reparation policy is not only to reconcile, rehabilitate, compensate or to dignify but also to address some of the root causes that led to the violations in the first place. The legal notion of reparations as explained in some of the early jurisprudence is essentially a directive to wipe out the consequences, as far as possible, of the violation and re-establish the situation as it was before. This understanding basically returns victims to their status prior to the violation, which as a conceptual notion is restrictive and potentially endorses the discrimination and prejudice against the marginalised population. Although the restoration of victims to their status prior to the violation has never really been or could be achieved, to use it as the standard of reparation is in itself quite problematic. Often the victims of any conflict around the world are the poor, the minorities, the marginalised, women and other groups that have been deprived of various rights for years. Restoration to a status prior to the violation would merely return the victim to her prior marginalised and possibly persecuted status. The restorative notion thus merely pulls the victim from the pits of degraded survival to the status of difficult survival without addressing the marginalisation and the persecution.

With regard to women, re-establishing the situation prior to the violation would in effect, in some contexts, restore the gender status quo. This could mean restoring women to being partial or sometimes non-rights bearing individuals. It would also mean endorsing and perpetuating the reality of withholding human rights, of discrimination and bias against women. For example, women often find themselves in or negotiate a more public role for themselves in times of conflict. And yet, in the conflict resolution phase or in post-conflict peace negotiations and peace keeping discussions, the normative gender values play a role when all actors, national and international, involved in these processes do not recognise the public roles women play and often ignore and neglect women as potential partners in the discussions. For reparation policies to be relevant and meaningful to women, the status quo with regard to gender needs to be challenged.

A post-conflict, peace negotiating society is in a phase of political transition and there is an

attempt to move from dictatorship, from anarchy, from one-party rule to democracy. During this stage there is much pressure from the international community and civil society for the ratification and implementation of all the major international human rights treaties and mechanisms and transitional governments often comply with these demand. It is also therefore an opportunity to outlaw all forms of discrimination against women and embark on education campaigns to implement the new laws.



Ms. Vahida Nainar

Ms Nainar went on to share some of the principles that should be incorporated into reparation policies:

### ***1. Non-discrimination on the basis of gender***

Reparation policies and procedures are often formulated by attitudes that are inherently discriminatory. Some of these discriminatory attitudes are that crimes against women are the inevitable collateral damage of war, that they need not be investigated, that the testimony of women cannot be trusted, that women can be represented by men in their families, that women need not be consulted. It is important therefore to ensure that reparation policies are guided by the principle of non-discrimination on the basis of gender.

**2. *Reparations policies and programmes must comply with the standard set by all the human rights treaties.***

Reparation policies must at the very least ensure that they do not derogate from the standards set by all the human rights treaties, both in its formulations and directives and its effect or the impact upon implementation of the policies. It imposes a positive obligation on states and the authorities affording reparations - they need to rise to the standard.

**3. *The structural and administrative obstacles that prevent women's access to justice or to reparations need to be taken into account.***

For example, if reparation policies involve issuing land to women, but the existing law prevents women from owning land, then the policy means nothing in practice. Structural changes often need to be put in place before reparations policies can be meaningful to women. The removal of administrative obstacles to access reparation is often necessary, such as the requirement for birth or death certificates where none exist or the non-recognition of women as the head of the household, or the refusal to open bank accounts in women's name, common in some Muslim societies.

**4. *Justice must be made available and accessible for women***

When women speak of justice they usually mean social justice. Rehabilitation programmes must address the specific needs of women and incorporate elements that have the effect of ensuring social justice to women, for example: education programmes that prioritise women for education or skills training, housing provided to women as the head of the household or provision of other kinds of sustainable livelihoods.

**5. *Affirmative action to achieve effective equality in real terms, needs to be introduced in recognition of the long history of marginalisation of women in many cultures***

Affirmative action must be recognised and recommended by reparation policies to bring

women victims of conflict into the mainstream of economic, social and political life of the new transitional nation. These may include quotas for jobs, the allocation of land and for political positions.

The research produced a long list of what women considered to be reparations. Some of it resonated with the voices of victims that Dr Danieli shared with us earlier, but to some extent it was different as well. There is a perception that justice per se, i.e. the investigation and prosecution of crimes is not important for women - what they often mean is that it is not a priority. They do not, however, ignore the option for legal justice as they are often in situations having to face their perpetrators in the neighbourhood.

When the numbers of both perpetrators and victims involved in the context of mass crimes is high, traditional forms of justice have been explored like the *Gacaca* courts in Rwanda. Some of the women participating in the *gacaca* process in Rwanda clearly appreciate that they have no other option despite the fact that there is no justice for women within this system. In northern Uganda, similarly, there was the exploration of the traditional forms of justice, which have not been in practice for years. Ms Nainar indicated that the question of reparational justice for sexual violence was not adequately thought out and is considered equal to justice for the theft of a goat or of cattle, which women themselves do not find adequate.

Ms Nainar went on to discuss some other procedural aspects that can hinder reparations for women. The requirement for the names of the applicants to be made publicly available can prevent women and particularly the victims of sexual violence from coming forward to claim reparations. The issue of not knowing whether a relative was dead or disappeared also hinders the process when psychological healing has not taken place and where the family cannot accept the death of their kin to claim the reparation. The definition of family is another problem when the procedures do not take into account individuals women consider as part of their families. Producing evidence of violations where none exist also cause problems for victims of sexual violence, particularly when the offence took place a number of years before the claim. In Chile it was accepted that

the mere mention of a violation in a newspaper could be accepted as evidence of a violation.

Like the discussion earlier in the Conference, Ms. Nainar indicated that the women she met too discussed the issue of reparations to victims versus reparations to perpetrators. In virtually all places of the research, the victims among the armed forces received reparations as a matter of priority. They received compensation, health services and priority in employment. On the other hand, victims who are civilians are still waiting for some form of reparations. Another issue is that of legal responsibility of states that do nothing to prevent violations and the extent of the responsibility of those that were involved in the violations, for example the involvement of the Indonesian Government in Timor Leste. The Belgian Government acknowledged its role in the Rwanda genocide with no understanding of its responsibility for reparations.

Acknowledgement is often accompanied by development aid with the explicit requirement that it is not used for reparations. The result is that when victims demand reparations they are told that a development project, such as a road or a water-well is the reparation for the violation they suffered. Post-conflict development needs to be understood as distinct from reparations. While the former is the right of all the citizens and responsibility of the state, the latter is the right of the victims.

## Session V: Challenges for Reparations in Practice (André Laperrière, Lisa Magarrell, Maître Luc Walley, Heike Niebergall)

This session was chaired by **André Laperrière**, the Executive Director of the Secretariat of the ICC's Trust Fund for Victims.

**Lisa Magarrell**, of the International Center for Transitional Justice, discussed truth commissions, reparations, victim participation

and outreach.<sup>8</sup> She noted that there is much to learn from those cases in which truth commissions have taken on the reparations issue.

Ms. Magarrell noted that positive consultation will make reparations more effective.

- Victims, their families and organisations that represent them are a direct source of information on key points of information: violations, harm, needs and social situation. In some contexts accurate information about the victims is severely lacking or deficient.
- Victims know what matters most to them and also what will give them some satisfaction, so consultation helps policy-makers plan more effectively. Reparations will be more successful if they resonate with victims, adopting priorities appropriate to victims' needs. Reparations that are not perceived as such lose their meaning as reparations.
- Civil society organisations often are one of the best avenues for outreach to victims to inform them about a TRC, reparations and a registry process once implementation is about to begin.
- To the extent that reparations incorporate the views of victims they can model one of their objectives, which is to recognise victims as respected rights-holders.
- We can also point to a positive impact of consultation in broader ways: it builds capacity of victim groups, promotes their active presence in the country's political life, and provides some new ground for trust.

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<sup>8</sup> The full text of Ms. Magarrell's remarks is available here: <http://www.redress.org/PeacePalace/OutreachEngagementLM.pdf>. In addition to the experience gained from the ICTJ's work on reparation in various contexts, Ms. Magarrell's remarks draw on an array of written sources, including a forthcoming "rule of law tool document" drafted by Pablo de Greiff, for the United Nations' Office of the High Commissioner for Human Rights; the ICTJ's recently published *Handbook on Reparations* (Oxford University Press: 2006); a volume of case studies on women and reparations entitled *What happened to the women?* (available for on-line access or purchase at <http://press.ssrc.org/RubioMarin/>), as well as *Memorias de un Proceso Inacabado* (forthcoming in English and currently available on-line in Spanish at: <http://www.ictj.org/static/Peru.Reparations/Memorias.Peru.esp.pdf>).



Lisa Magarrell

Participation must actually be meaningful participation. This requires policy-makers to address at least five key questions:

**i. Who are the victims and how are they represented for purposes of consultation?**

Victim groups are numerous, not homogeneous, far flung, under-resourced, and often have organisational structures that do not lend themselves to representation by individuals. Dealing with heterogeneity poses particular problems for those seeking to devise ways to legitimately “consult with victims” at different stages in the process, when interests may or may not converge within the broader universe of victims.

**ii. How to identify best ways to engage with them?**

In Peru, ideas were floated about an advisory panel of victims to a national body on reparations, but failed because of practical considerations of how to choose representatives and the role they should play. A follow-up Commission composed of government and civil society representatives proposed a registry of victim groups in order to channel communications, yet victim groups hung back because it seemed to them to be a form of social control.

While it can be fraught with tensions, the presence of other non-governmental advocates (usually human rights groups) makes it possible to reach out to victims and engage them in the reparations process even outside of the formal government proceedings and then channel that information to the truth commission or post-

commission reparations processes. For instance, in Ghana, an NGO (CDD) undertook a survey prior to the start of Ghana’s NRC proceedings to determine victims’ expectations of the NRC’s work.

Although the participation of affected people in the construction of policies and programmes and in overseeing the implementation of reparations is difficult and the forms adopted to effect participation should themselves be studied critically, the complexity of the issue does not exempt the State from its responsibility to create and facilitate opportunities for consultation and real participation.

**iii. Is there a common conceptual ground?**

Are victims, truth commissions and government even talking about the same thing when reparations are on the table? In transitional contexts, victim priorities are almost always a mix of reparations and other social justice oriented policy issues; sorting those out for the purposes of fruitful consultation around reparations is an important process.

**iv. Does participation come at important moments?**

Consultation and participation make sense not only in defining what reparations measures should be, but in defining what violations are being looked at, and later, how reparations will be implemented. For example:

Defining the mandate for a truth commission: In the critical issue of the choice of the list of rights whose violation will ultimately trigger reparation benefits, the participation of women may help ensure that the sorts of violations of which women are predominantly victims are not left out. In South Africa, for example, women’s organisations were not central to the creation of the TRC or the drafting of the legislation that created it. As a result, a ‘gender-neutral’ law was drawn up which failed to spell out the gendered differences in the experience of the conflict and the resulting differences in needs of victims.

Defining victim-sensitive reparations during the truth commission process: Most truth commissions that recommend reparations do

consult victim groups more generally. In fact, it is during the truth commission process that is probably the moment in which we can point to the greatest consultation successes.

Passage of legislation: In Peru, expertise and organisation developed in NGOs and victim groups around the topic of reparations during the TRC process was put to service in the legislative process, through lobbying and public pressure, and the unity they had already forged in the course of their debates with the Commission.

Implementation of reparations: Outreach is key to the success of reparations:

*“Outreach in the context of reparations is normally understood in terms of efforts to make the existence of an already designed program known and to facilitate access to its benefits. As crucial as this might be, if participatory processes of the sort just mentioned are to take place, outreach must start long before the program is fully designed. This is so particularly in contexts in which there is at best a weak tradition of consulting citizens, or where such traditions were interrupted, as is frequently the case in post-conflict and transitional societies.*

*Even a well-designed reparations program will fail to distribute benefits to every potential beneficiary if it is not accompanied by effective outreach efforts once it is set in place. Some of the difficulties with outreach can be seen from the work of truth commissions. Merely writing a good report, no matter how good its quality may be, does not guarantee its uptake on the part of civil society, let alone its impact, particularly on government institutions. In contexts with high levels of illiteracy, difficult transportation, and deep social fractures (ethnic, linguistic, religious, class or regional differences), outreach becomes even more important. Furthermore, despite the incentive effect of the benefits, sometimes it has proven more difficult to draw people into a reparations program than to give testimony to a truth commission, for the former requires not just providing testimony, but making a request, filing applications, and presenting documents and evidence. The outreach that is called for, then, is not only particularly intensive in terms of dissemination of information about the existence of the reparations program, but also in terms of assistance going through the process. Whatever outreach measures are designed, it is important to be sensitive to gender differences, being ready to adjust outreach efforts so as to draw in as many female beneficiaries as possible. Similarly, in cases in which the conflict has generated large numbers of exiles, it is important to establish outreach efforts that can capture exiled groups.”<sup>9</sup>*

Outreach to victims is also important after the TRC because an important number of victims are not reached by TRC processes.

<sup>9</sup> HCHR reparations document, pp. 15-16.

Oversight of implementation: For example, in Timor-Leste, the CAVR recommended that the implementing body of the reparations scheme would engage grassroots facilitators at the district level to help connect victims to services, while the implementing body would develop programmes together with NGOs to assist victims, victim groups, and communities in addressing “needs and issues in a sustainable and empowering way.” The CAVR also recommended establishment of a permanent consultative advisory board to include representatives of victims and victim groups, and organisations and individuals with high standing in the community for the protection of victim rights. (These recommendations have not been implemented to date.)

#### v. Does participation have a real impact?

Participation must be something that ensures ultimate delivery of real benefits to victims. Engagement of victims should be furthered in a way that links their experience to broader social understanding and alliances for implementing reparations, and that builds credible grounds for trust between government and victim groups for working together in the future.

A report from South Africa provides a cautionary tale:

*“...by failing to consult with survivor groups before deciding on the final amount for reparations, government wasted an opportunity to learn about the different survivor needs, which would have helped in designing a more comprehensive reparation policy with potential to optimise its effectiveness. The report also characterises that failure as a lost opportunity for government to mend a difficult relationship between itself and survivor groups, including NGOs and other stakeholders lobbying for reparations.”<sup>10</sup>*

Participation also needs to be strategic. In South Africa, campaigns to demand a policy on reparations was focused too heavily on financial grants and moved attention away from the need to address other survivor needs.<sup>11</sup>

<sup>10</sup> Oupa Makhalemele, *Still not talking: Government's exclusive reparations policy and the impact of the R30000 financial reparations on survivors* (Center for the Study of Violence and Reconciliation, 2004).

<sup>11</sup> Ibid.

Ms. Magarrell concluded by stating that the objective need for participation is often not matched by an easy parallel of capacity, resources, and forms of participation in the universe of victims. She notes that the greatest challenge to participation is in the transition from proposal to implementation. Unless victims have strengthened their voice and political clout, and gained public sympathy through the truth commission process, this will be a significantly difficult period for effective participation. International assistance and support seem to drift away during this post-truth commission phase, when victim groups and human rights NGOs may need more attention and resources than ever.

She also reminds that participation, outreach, and engagement in the question of reparations are not all about victims. Reparations policy, to become reality, must have a stronger alliance of support than only victim groups. Truth commissions need to ensure that they “prepare the ground” for recommendations in this area, while those working for reparations from outside the commission need to broaden their alliances and inform policy makers.

**Luc Walley**, a Belgian human rights lawyer explored the challenges for lawyers associated with incorporating victims’ views in reparation cases.

Maître Walley explained that representing victims of mass crimes before the ICC is a rewarding but challenging job, which has little to do with supporting the prosecution’s case. Before addressing reparations, counsel must present, in the language of the ICC Statute, “the views and concerns” of the clients.

Analysing the objectives of a group of victims and translating these into a legal action is the first challenge for counsel. Members of a group of victims will not necessarily have the same views on their situation. Some may even support the position of the defence, as was the case in the Belgian trials about the genocide of Tutsi in Rwanda, where some genocide survivors were saved by one of the accused. The fact that victims are organised in a group or structure does not always makes things easier, as spokesmen of a group can have a

political agenda, which is not shared by all members.

When the security situation allows, meeting with the whole group of victims, and if not with each member of the group, at least with some is essential. This assists the counsel to understand the expectations of his clients, and provides the opportunity for him to inform the clients about the legal possibilities and to develop strategies.

Discussions on legal strategy can lead to conflicts or split groups, which counsel should avoid when possible, stressing the common interests of the group, sometimes de facto becoming a conciliator or arbiter.

From his experience, Maître Walley shared that the first thing victims of crimes against humanity and war crimes want is generally not compensation, but justice. In their view, compensation should be the result of a process of accountability. Victims know that the outcome of a legal action is uncertain. But, hungry for justice, they accept the risk of a defeat by challenging the persons they consider as responsible for their suffering, hoping the action will at least give publicity to their view, provide opportunities for punishment or accountability, and enable victims to stress their views on the situation.



Luc Walley

Two important traps should be avoided. The first is to accept cases without legal or factual grounds and without any chance of success. Even if the victims are insistent that an unmeritorious case proceeds, it would be rendering them a bad service, and would also constitute an abuse of the justice system for

purely political purposes. The second possible trap is to raise illusions about compensation. Outreach programmes for victims in the framework of the ICC should avoid this too. When the primary motivation of victims becomes financial compensation, a case can also be polluted by false or exaggerated claims.

### **Compensation and accountability**

Although for most victims, compensation is not the main issue, their participation is often understood by others as a compensation claim. In the ICC system, applications for participation and for reparation are clearly distinct. This means that a victim can apply to participate, even if he or she doesn't intend to request reparation, because of the fact that the accused is indigent, or reparation is made through other channels.

Reparation alone can never be a substitute for accountability. All the families of Belgian peace keepers killed on the first day of the Rwandese genocide received financial compensation from the Belgian State; still, it is essential for them to see those responsible for these killings before a court. In the Lubanga case,<sup>12</sup> former child soldiers and their families are participating because they want to be recognised as victims and not as perpetrators, because they feel betrayed by those who pretended to be their leaders and representatives. In some cases even the very qualification of the events can be important for victims (genocide or assassination for example).

Of course, reparation is important too, as a matter of principle, but also because most victims of war crimes and crimes against humanity are living in very difficult conditions. The approach of victims regarding financial compensation depends on the circumstances. When relatives of Belgians who disappeared or were killed during the Guatemalan dictatorship lodged a complaint, the embassy invited them to negotiate a compensation agreement. The immediate reaction was to consider this as an attempt to cover up the case by "buying" the plaintiffs. They wanted to know what happened exactly to their family members and who decided that they had to disappear; they also

wanted to locate their remains. The families wanted prosecution and punishment for the individuals responsible for their suffering. They wanted justice, not money.

In 2001, two Rwandese nuns were convicted in Belgium for their role in the killing of hundreds of Tutsi who tried to find a safe heaven in the buildings of their convent. For the relatives of these people and the genocide survivors in general, this was an important victory. As counsel of a group of widows which could assess the responsibility of these nuns for their dead husbands, I discovered that the issue of negotiating compensation with the convent became a political issue and was seen as an attempt by the nuns to obtain from the victims some help to be liberated. Within the group of victims, the tension was visible between those looking to the past who wanted justice, and those looking not only for the improvement of their present poor condition, but also for a better relationship with their neighbours.

In a separate case, a victim of torture in Saudi Arabia asked immediately for a financial settlement, and lodged only a criminal complaint when his request was rejected by the Saudi Government.

When the payment of compensation is the result of an acceptance of responsibility or the application of the restitution principle, it will be seen as a valuable act of justice by the victims, certainly when it results from a process of negotiation with their representatives. This was the case when the Belgian state and financial institutions accepted recently a compensation programme for goods and assets of Holocaust victims.

Financial intervention by international funds is certainly justified when the International Community bears a part of the responsibility for its failing to prevent the crimes. It is more problematic if there is no link between responsibility and reparation. When reparation is a unilateral decision of a national or international institution, compensation can be seen as just a lucky incident, if not as charity.

For the victims, the origin of compensation is important. The group of Rwandese widows that Maître Walley referred to received help from a protestant NGO to repair their houses. This was

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<sup>12</sup> The Prosecutor v. Thomas Lubanga Dyilo, Case ICC-01/04-01/06.

welcome, but seen as charity, not as compensation. If the Catholic Church had done the same, it would have been seen as compensation and accountability.

The origin of compensation funds is thus not neutral, and this could become an important aspect of the discussion on the ICC victims' trust fund and other compensation programmes. Recuperation of assets of perpetrators is as important as contributions of sponsors.

#### **Individual and collective reparation**

Collective forms of reparation are often a logical approach to offer redress to traumatised communities. In most occidental legal systems however, reparation is an individual problem, certainly in civil law systems where even the concept of "class action" is unknown. The counsel representing a group of victims will then be forced to translate the demand of a group of clients, even if they are organised, into individual applications for compensation. This translation risks also breaking the solidarity of the group. When those convicted have some assets, only the victims who were represented in court will be able to obtain compensation, the most assertive ones, those with the highest education and sometimes the most wealthy, whereas others in the same situation will stay without relief.

Discrimination within the group of victims is often inherent in reparation and restitution programmes based on individual claims. Another disadvantage is that no compensation is to be paid to families who were totally exterminated. That is why the Belgian compensation programme provides that a part of the compensation will be collective, through representatives of the Jewish community legally recognised as such. Unfortunately, no solution could be found for the less well-organised Roma community.

Collective reparation also poses a danger that must be taken into account. In Rwanda, for example, Tutsi survivors of the genocide are sharing their neighbourhoods with Hutu families. Compensation for victims can raise jealousy, jeopardise reconciliation between communities, revive the conflict between groups, and eventually put the beneficiaries at risk. Even the few advantages accorded to

families of genocide victims by the Rwandese Government, like free school inscription for children, were criticised as forms of ethnical discrimination. So collective reparation also needs explanation and if possible, acceptance of all communities concerned.

#### **Avoiding new victimisation**

Victims searching for justice and redress are taking risks. Even when the conflict is officially over, the hatred is still there. Victims who demand justice are often seen as enemies searching for revenge.

For victims, the decision to participate in a legal action is not an easy step. It reopens old wounds, entails a new confrontation with a difficult past. Especially for victims of sexual violence, participation in a legal action can provoke a need for psychological help. The legal counsel must take this into account when questioning his clients and asking them to testify.

Some victims may want to speak out and to testify. Challenging and confronting the accused perpetrators can restore their dignity and self confidence. Unfortunately, it can also put them at risk. In a region in conflict, any contact with a foreigner can create a security risk.

It is a duty for lawyers as for investigators to protect the safety of victims and witnesses through a professional approach, sometimes by asking the Court to protect their anonymity. One of Maître Walley's clients (a genocide survivor) was heard as a witness in the second Brussels Rwanda trial. Probably because of her cooperation with the Belgian investigators and the publication of her name in the case record, she has been sexually assaulted again, just before the start of the trial. In the Lubanga case, the Court accepted the anonymity of participating victims, although after the hearing on the confirmation of charges, one of the participating victims was nevertheless discovered and threatened and protection measures were organised.

#### **Counsel as independent spokesman**

Last but not least, presenting the views and concerns of victims is also encouraging understanding for them. When Palestinian survivors of the Sabra & Shatila massacre used



the Belgian law to force an independent investigation, it was a hard challenge for them and for their lawyers to convince the Israeli and even international public opinion that legal action is not revenge, but an alternative to revenge. It was equally difficult to convince the Lebanese and Arab public opinion that an international investigation should entail accountability, not only of Israeli officials, but also of Lebanese individuals, notwithstanding the amnesty law. When radical political groups tried to get control over the action, the legal team was heavily criticised in the Lebanese press for cooperating with Jewish-Israeli lawyers and suspicion was created against the Lebanese member of the team because of his Christian origin.

Crimes against humanity are often committed in a political context. In cases of international crimes, a legal case can become a political or diplomatic struggle, or will at least be influenced by political factors. Lawyers, who don't necessarily share the political analyses of their clients on the situation in their country, must tread carefully when presenting their clients' views and concerns, and at the same time avoiding the risk of getting involved in an ongoing conflict. Certainly in less developed regions, identification between a lawyer and his clients occurs easily.

Reparation is a form of justice; it must also be seen as justice. International judicial systems, as the ICC, give victims the opportunity to have an influence, not only on reparation issues, but also on issues of jurisdiction, criminal responsibility, and even provisional or conditional liberty of the accused or convicted person. Being heard is essential for victims, and should of course also be possible in reparation procedures themselves, to make reparation a true component of justice.

**Heike Niebergall**, Senior Legal Officer for Reparation Programmes at the International Organisation for Migration, provided insight on how to overcome evidential weaknesses in reparations processes.

Ms. Niebergall provided an overview of the approaches and techniques applied in the area of evidence and the administration of evidence as applied by recent programmes that provide

compensation to individual claimants or restitution of property loss during conflicts. She focused on the claims resolution tribunal in Zürich and the German forced labour compensation programmes, and recent property restitution programmes including the programmes in Kosovo and Bosnia and Herzegovina following the conflicts there.

All these programmes have been characterised by three main aspects: They have all received a large number of claims, they all had limited resources to process their claims and they all faced strong pressure to process them in a reasonable amount of time. While the characteristics were not equally apparent in each programme they all faced the same balance between individual justice and achieving a solution for all claims in a reasonable amount of time. Earlier in the Conference proceedings this was referred to as 'individual justice' versus 'rough justice.'

All programmes face a tension between the due process rights of individuals and the need to streamline the process due to a large number of claims. In dealing with this challenge mass claims processes have developed approaches and techniques that are not known in the case by case review by traditional, judicial courts. Ms. Niebergall gave an overview of these in relation to evidence, beginning first with a discussion of the evidentiary weaknesses facing the large claims processes.

Supporting evidence submitted by claimants, it can generally be said, is the scarce commodity in mass claims processes. Various factors make it very difficult, if not impossible for claimants to prove and substantiate their losses, the circumstances under which the violations occurred, the destruction of homes, deaths of family members who might have had information, the lapse of time since the loss occurred, destruction of public records or their poor quality, and the limited access of those claimants to the records especially if they are now refugees.



Ms. Heike Niebergall

It is important to remember that the reason for the lack of evidence in individual claims is very much linked to the circumstances leading to the loss. Almost all the evidentiary problems faced by the claimants result from the harmful act upon which the claim is based. Taking this reality into account recent mass claims processes have generally attempted to be claimant-friendly with regard to their evidentiary requirements. They have tried to take on innovative approaches to the administration of evidence.

The evidentiary challenges have been addressed on two different levels. On the one hand, by relaxing evidentiary requirements on claimants, and on the other, by applying certain mass claims processing techniques in order to fill the evidentiary gaps in individual claims. With regard to the relaxing of evidentiary requirements, Ms. Niebergall mentioned burden of proof, evidentiary standards and fact finding by the tribunals or claims commissions themselves and the use of presumptions.

While in claims processes the burden of proof, in principle lies on the claimants, given the problems of insufficient evidence available to claimants, processes have eased the burden of proof considerably. They have done so by

sharing the burden with other parties either directly or indirectly involved, for example, by stipulating an obligation for these parties to cooperate. In addition the processes themselves have actively participated in the gathering of evidence. For example the procedures of the claims resolution tribunal for dormant accounts stipulated that the banks were under an obligation to disclose all the information contained in the bank records; after an initial screening, to the claimants, they could then build their claim. In the German forced labour programme, claimants had to show their eligibility for compensation, by the submission of documents, but this burden was reduced by the very active fact finding operations of the partner organisations.

With regard to the evidentiary standards, rather than applying the standards that can be distinguished in international practice, such as 'beyond reasonable doubt,' 'clear and convincing proof' or a 'preponderance of the evidence,' mass claims processes have taken a different approach. They have relaxed the standard of evidence in order to facilitate the claimants' task of gathering and presenting the evidence. The UN Compensation Commission (UNCC) had different categories of claims, including claims by individuals, corporations and governments. It established a system of evidentiary standards which varied depending on the category of claim. A more relaxed system was in place for small claims from individuals and the evidentiary requirement became more stringent the larger the sums involved and certainly they were more stringent for corporations and governments.

The Holocaust related mass claims processes introduced a new standard of evidence which is either referred to as a 'relaxed standard of proof' or as in the case of the Claims Resolution Tribunal and the German Forced Labour Compensation Programme the 'standard of plausibility' was applied. For example, in the Claims Resolution Tribunal the claimant has to show that it is plausible, in light of all the circumstances that he is entitled to the account. The German Forced Labour Programme applies the standard of credibility and provides that if no relevant evidence is available, claimant eligibility can be made credible in some other way. These were new

ways of lowering the threshold for claimants to meet the standard of evidence.

It is interesting that although the term 'plausibility' has been used in at least three of the Holocaust related programmes, no general definition seems to exist as to what exactly constitutes a plausibility finding. Standard dictionaries define the term 'plausible' as believable and appearing to be likely to be true, usually in the absence of proof, or appearing worthy of belief. However, such a definition does not answer the question of what is required to meet the threshold of plausibility. The rules of the Claims Resolution Tribunal 1, try to fill the term by identifying three requirements for a finding of plausibility. First, the judges had to be convinced that all documents had been produced and that all information had been provided by the claimant that could reasonably be expected to be. There had to be no reasonable basis to conclude that forgery affected the claim. Finally, there had to be no reasonable basis to conclude that any other person would have an identical or better claim. Despite these three additional criteria there was a lot of flexibility in the application of plausibility.

With regard to the finding of fact, the UN Compensation Commission itself gathered relevant information and documentation to help establish the facts. They did so by gathering evidence that would not be available to the individual claimants, for example they got access to the residence databases of Kuwait and Iraq and could use them to verify information about departure as well as other facts in the claim. Particularly for the German Forced Labour Compensation Programme a lot of historic research was conducted to help establish facts for claims.

The fact finding enabled the application of presumptions that have been applied to fill the gaps in claims. One of the eligibility requirements for compensation under the German Forced Labour programme, in the category of property loss, was to establish a causal link between the property loss and the involvement of German companies. This link was extremely difficult for the claimants to establish. Based on historical research by the partner organisations and the Commission, the property claims commission developed

presumptions regarding the causality, if the loss had occurred during a certain period and in a territory occupied by the Reich during that period then it was presumed that the loss happened due to the involvement of German enterprises. This presumption was developed like a geographical grid together with the time frame. It enabled many claims to be decided positively even though the individual claimants would not have been in a position to establish the causal link.

The Claims Resolution Tribunal in relation to the Holocaust victims' assets litigation also applies a number of presumptions with regard to amounts in accounts and particularly regarding the question of what happened to assets of closed accounts. A claimant does not have to prove that although the account had been closed he or she did not receive the assets, which would be very difficult to prove.

The mass claims processing techniques rely heavily on computer support and on the programme to first capture the data contained in claims in the databases. The three areas Ms. Niebergall mentions here, mostly because they relate to evidence are the computerised grouping of claims, the computerised data match of claims against external sources and the application of standardised valuation methodologies.

The grouping of claims allowed claims with the same fact pattern or similar profiles to be reviewed together. After all claims have been entered into the database the computer then groups claims with the same profiles. The German Forced Labour programme grouped claims in terms of time period and the location. This technique facilitated the supplementing of one claim with information contained in another, because if you review them at the same time, and you have 360,000 claims you will not know what has been read in a claim early on. Grouping also allows the easy and straightforward claims to be dealt with first and then to focus on the more difficult claims. The bulk processing of the simple claims is sensible considering the limited budget. Most importantly, grouping makes the decision of all claims in a group possible following the precedence setting of just a few representative claims in the group. The German Forced Labour Compensation programme grouped claims by

first processing all claims that had certain documentary evidence that could be easily resolved. Then those claims that had no evidence were matched against external sources. After this, only those that had no match to the external sources and thus could not be verified underwent a thorough individual review. Grouping has been essential for mass claims processing.

Valuation methodologies include the use of lump sum payments, which as was heard earlier in the Conference, are a common way of streamlining a process. Claimants only have to establish that they lost something or that their rights were violated, they do not have to provide evidence regarding the amount of the loss which is always difficult to prove. Some processes, in particular the UN Compensation Commission, refined the approach and used statistical modelling so that claims with the same loss type were grouped and a statically relevant number of claims were examined. The amount that applied to this sample was then extrapolated to the entire group.

In closing, Heike Niebergall discussed the very first considerations to apply from the outset of any claims programme. It is important to know from the beginning what kind of evidence will be essential for the decision maker to decide about a claim for compensation or restitution. With it has to go some sort of research on the ground to determine what type of evidence is available to applicants, what types of external records exist after a conflict that can be used as verification data. The answers to these questions will have to drive the design of a claim form and the type of information that is to be requested from claimants to meet the standard of evidence.

One cannot discuss reducing the standards of evidence without mentioning that one of the key considerations to emphasise in a reparation process is how much proof from claimants is needed to ensure the integrity of the process. If the standard of evidence is reduced this has an effect on the accuracy of the outcome. We have heard how difficult the process of filling out the claim form can be for victims, when they have to relive the trauma, and this needs to be balanced with the concerns that only those that are really 'worthy' of the compensation should be receiving it. Choices

regarding evidence impact upon accuracy but perhaps in some programmes accuracy was not the predominate value to be achieved. It is not, however, so simple, particularly for processes where the compensation to be paid comes from a limited fund, so every claimant who is a 'false positive' takes money away from claimants that are truly deserving.

The question must be asked, who should bear the costs of the error, due to reduced standards of evidence? Should it be the claimants or the respondent and in the case of a fixed fund it is a complex question to answer.

## Questions and discussion - Afternoon Sessions

**Mr André Laperrière**, Executive Director of the Trust Fund for Victims of the International Criminal Court began by drawing attention to the recent UN resolution on the Responsibility to Protect,<sup>13</sup> noting that it provides clearly that States are responsible for the protection of their citizens and the active protection of victims. It also refers to the Rome Statute and the Trust Fund for Victims, and contains a wide definition of victims, "*victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights through acts or omissions that constitute gross violations of international human rights law or serious violations of humanitarian law.*" It provides further that "*Where appropriate and in accordance with the domestic law, the term victim also includes the immediate family or dependants of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.*"

He then took questions from the floor.

**Heike Niebergall**, in response to a question from the floor, noted that one of the major challenges in a collective claims resolution process is identifying claims that result from the same loss, particularly when the claim is made by a subsequent generation who is spread

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<sup>13</sup> GA resolution 60/147 adopted March 21 2006.

throughout the world. Usually, at the outset of the process claimant families are encouraged to file together using one claim form, then one member represents the claim for the group.

As part of the review process, one has to locate linkages between claims and join them into a single proceeding. This can be very difficult and resource intensive, and could be avoided if the claims were filed together in the first place,.

**Lisa Magarrell** noted that in the context of judicially ordered reparations where massive abuses have occurred, courts often face the problem of how to craft reparations for the individuals before the court while at the same time recognising that there are other victims. There have been negotiations for groups of claimants. For example, in Peru, many claims (over 150) were grouped in the Inter-American System to try to negotiate common solutions that are comparable to mini reparations programmes. The Inter-American Court tends to get the names of every victim related to group cases, such as massacres. We will see cases, from for example Nicaragua and Colombia, with lists of hundreds of victims because the Court focuses on individuals' rights, not rights as collectives. Also recently in Canada where class actions are allowed, the settlements of thousands of cases is resulting in a political agreement for reparations. Truth commissions tell us that it is important to look at both the individual and the collective and that there may be very different circumstances regarding what is important to victims in each case.

**Dr Yael Danieli** noted that there is also the issue regarding accepting and being prepared for both individualist and collective cultures. However, what interests her from a psychological point of view is that when you have a group of victims making a joint claim, they already are forced to discuss it among themselves. If this can be achieved correctly it becomes a healing process itself. The group can enhance each others' sense of victims' rights, and a conflict resolution process can be achieved with their group. The success of this is largely dependant on the leader in the group and whether individuals have the chance to express their anger without destroying the group.

**Vahida Nainar** emphasised one aspect that Dr. Danieli had mentioned - the need to ensure that collective rights are carried out correctly. Which 'collectives' are we talking about? She noted that she rarely sees collectives made up entirely of women addressing their common violation. The extent that the marginalised within the group have an individual voice is also important.

**Dr. Esther Mujawayo** noted that the process of trying to repair the irreparable has to be part of the whole process of dealing with post conflict reconstruction. It becomes too risky if it is seen as a one-off event and victims are told just to move forward; it should be an integral part of what the society is trying to achieve over a long period of time. The process needs to be driven by victims themselves not a political process.

**Luc Walley** noted that with regard to collective reparations there is no unique solution for every situation, there needs to be a specific approach. In some situations collective reparation can be very negative because if there are two communities opposed to each other and they as a whole receive compensation it will be felt badly by each community. In Rwanda some very limited advantages in schooling, for example, are coming under attack with the Hutu asking why should the Tusti have free access and not we? It is, thus, important to explain reparation measures. The ideal situation would be that communities, even those including perpetrators, come together to agree a compensation programme.

**Dr. Danieli** stated that it true in Rwanda, regarding the education, that the education and support for children of victims and child victims was not given to Hutus. However, last April this was corrected and now the law sees everybody as equal in that regard. Though it then goes back to the question of whether it is reparation or civil rights.

## Session VI: Reparations and Recovery of Assets (Fabricio Guariglia, Saul Kagan)

The session was chaired by **Mr. Fabricio Guariglia**, Senior Appeals Counsel of the Office of the Prosecutor of the International Criminal Court.



Fabricio Guariglia and Saul Kagan

Mr. Guariglia provided an overview of the work of the Office of the Prosecutor (OTP) and its relationship with victims of crimes within the jurisdiction of the Court.

He noted the variety of ways in which officials of the OTP may come into contact with victims, and in particular, the important role of OTP investigators, often the first to come into contact with victims, as well as the role of the OTP in affording protection to victim witnesses and potential witnesses.

He noted some of the recent positions taken by the OTP in respect of victims, in particular relating to the breadth of their right to participate in proceedings before the Court and the timing of such participation. He reminded that whilst the OTP's approach was narrower than what the claimants wanted, it was the belief at the Office that this was most consistent with the ICC Statute and most workable in practice.

Mr. Guariglia also referred to the role of the OTP in the locating of the assets of accused persons, referring to the provisions in the ICC Statute and Rules of Procedure and Evidence which provide the OTP with an important role in seeking out assets of accused persons for the ultimate benefit of victims. In this respect, he noted that the specific provisions of the Statute represented a positive development vis-à-vis the normative framework of the ICTY. He also indicated the numerous challenges for the Office to identify and assist in the recovery of assets for the benefit of victims and noted that up until the present, the OTP had not yet been in a position to fully develop this aspect of its activities.

During the question and answer period, Mr. Guariglia clarified, in respect of the locating and freezing of assets that the challenges associated with the detection of assets is frequently a problem relating to cooperation between the requesting authority (the relevant organ of the ICC seeking cooperation) and the requested State. A question was posed about the vagueness of a request by the Pre-Trial Chamber to all States Parties to locate and freeze assets belonging to Mr. Thomas Lubanga, an accused before the Court. Mr. Guariglia opined that in general when a request for assistance is framed in vague and general terms without documentary evidence in support, this does not provide sufficient assistance to the State, thereby jeopardising the success of the exercise.

He related, in respect of the request of the Pre-Trial Chamber that the OTP considered that more time was required to make a more targeted request. In particular, the OTP needed to ascertain if they could gather any further information to make a more focused request for assistance. Consequently, it did not make a request for location and freezing of assets while applying for an arrest warrant. He indicated that the Pre-Trial Chamber validly considered that the request ought to be included in the decision covering the arrest warrant, It may be that the Chamber considered that it was better for States to begin looking for any relevant assets without further delay, and if they found something relating to Lubanga then all the better. He indicated that such an approach would be perfectly reasonable, but would obviously create more work for requested

States due to the nature of use the request: a general one directed at all States Parties. Mr. Guariglia further recognised the important role the OTP has to play in this regard. He indicated that within the OTP there is a special cooperation unit, which ensures that all requirements attached to requests for cooperation are fulfilled, in order to avoid such requests to be turned down by States or international agencies.



Fabricio Guariglia

In response to a further question, Mr. Guariglia indicated that the ICC reparations system is inevitably limited as it is linked to particular perpetrators and cases. This can lead to unfortunate situations, such as where a victim who was not in a particular town at the time in the particular case; they will be left out of the ICC's reparations scheme. This could be rectified by giving a broader role to the Trust Fund. Mr. Guariglia noted that compensation should not be left solely to the ICC.

In respect of the modalities for participation involving numerous victims, he indicated that it was likely that each Chamber would set deadlines for applications to participate in the relevant procedural stage, and would try to encourage victims to participate in groups. He indicated that the ICC is an imperfect system in that it is not designed to arrive at universal compensation or universal reparation; the ICC reparations system is situated within a criminal justice system. As such, it is necessarily case related and narrow in scope.

Perhaps more could be done by giving a broader role to the Trust Fund. The important thing is to lower the expectations - compensation

should never only be left to the Court's devices; the ICC only provides one measure of justice.

In respect of the emphasis of the Prosecutor's indictments, Mr. Guariglia indicated that the OTP takes into consideration a range of factors. What should be borne in mind is that the ICC is different from the ad hoc tribunals in the sense that while the latter deal with a single situation, the Court has different situations queuing up. Each situation contains a vast number of crimes, victims, incidents and potential perpetrators, thus selectivity lies at the heart of the Court if it is going to work efficiently. The ICC cannot afford to have a trial of the scale of the Milosevic trial at the Yugoslav tribunal. The ICC has a fraction of those resources and is designed to be a more modest and flexible enterprise. The OTP can bring cases that it strives to make as representative as possible of the criminality that has taken place in the field, without losing focus. This will lead to fewer cases being heard and thus arguably fewer victims receiving reparations within the framework of criminal cases, but this is necessary in order to ensure the system does not collapse from over stretched resources.

In respect of victim protection, Mr. Guariglia noted that the OTP has taken it as its responsibility together with the Victims and Witnesses Unit in the Registry. Unlike the ad hoc tribunals which operated in post conflict settings, the ICC's work is different. Given the ongoing conflict and security considerations it is difficult for the ICC to rely on local authorities to protect witnesses. He noted the policy of the OTP not to approach anyone without a prior assessment of the risk; not to approach the person if we think they will be overly exposed as a result of their contact with us. He also indicated that with vulnerable witnesses the OTP also carries out a psychological assessment so before its investigators approach a person the OTP sends its experts and they hold a non-evidentiary interview to see in the person is able to revive the ordeal or if it will create further victimisation. If the assessment is negative, the OTP will not interview that witness, in the same way that if our security experts say a town is unsafe then we will not go there. The OTP also has a rapid response system to afford urgent protection. The system

works to the extent that the cases are kept within manageable limits - not if you have a Milosevic-type case.

Mr. Guariglia indicated that OTP's position has always been pro victim participation. The ICC Statute is very clear in affording victims the opportunity to participate. He noted that Pre-Trial Chamber 1 came up with what the OTP considered to be an expansive interpretation of Article 68(3) of the ICC Statute by creating a continuum of participation at the investigative stage beyond those clear islands of participation clearly set out in the Statute. Victim participation should occur when it is meaningful and necessary, in the sense that victims should get access to information and be able to make their views and concerns heard. What the OTP opposed was the unclear limits to this continuum of participation which went much further than the negotiations on the ICC Statute intended.

**Saul Kagan**, of the Conference on Jewish Material Claims against Germany, provided the audience with a snapshot of the efforts of the Claims Conference over the past 60 years to secure restitution of assets confiscated by the third Reich and its satellites.

Mr. Kagan reminded the audience that the efforts of the Claims Conference to obtain reparations was, and continues to be, a multi-decade process spanning more than 60 years. The initial negotiations were complex and took a lot of determination and perseverance to even bring the parties to the negotiating table. The initial negotiations resulted in the first payments with a lot of restrictions, for 25,000 beneficiaries, including lump sum and per capita payments. It was clear at this point that there would be individuals who would not be covered by the initial programmes though Mr. Kagan indicated that they did succeed in the signing of the agreement and fought hard for it.

Mr. Kagan conveyed to the audience, made up of people who had come together in The Hague to consider and plan what has to be done for new groups of survivors of genocidal acts wherever they exist, that the Claims Conference with its practice and resources, forms and programmes is available to any group in any form to provide assistance. Anything that

the Claims Conference can contribute to assist current survivors of genocide will give it inner satisfaction to the heart. The universal lessons of the Holocaust are something that starts with prejudice and bias and turns to hate and ends up in crematoria or the equivalent to it. Whether they are the killing fields of Cambodia or the slaughterhouses of Rwanda or the fires of the villages of Darfur - that is the universal lesson of the Holocaust.

Mr. Kagan recounted that when on 8<sup>th</sup> May 1945 when he was with the US Airforce, he had the naïve hopes of 'never again:' "*Obviously we don't need to say how many times 'never again' has happened again and again, and there is no guarantee that Darfur is the last chapter of genocidal extermination.*" The universal lessons of the Holocaust are our collective life insurance as nations, individuals and groups.

A good part of the resources that the Claims Conference has been able to develop as a by-product of the restitution programme is being devoted to the research, documentation and education on the Holocaust.

Mr Kagan reminded the audience of the importance of always providing a clause for annual reviews of any programme that gets bilaterally agreed upon as one goes forward. He reminded us that the Claims Conference started with 25,000 beneficiaries but has now been able to make payments to 300,000 individuals, in a process that has been ongoing for 27 years.

The restitution programme is an essential programme. It is important to develop data; information on the basis of which one can search and seek for assets that have been taken unlawfully and confiscated. Legislation is a primary instrument if it can be achieved, on the basis of which claims can be filed and through the process of which property and assets can be recovered. Not in full, he reminded; there is no *Wiedergutmachung* - there is no restitution in integrum under the best of circumstances - impossible. So the issue is the degree and extent of restitution. This will depend on the effectiveness of the legislation which has to be fought for as intensively as possible and then on the thoroughness of the process of research and documentation of the claims. The techniques are varied - in some cases for restitution, in *natura* is possible.



Mr. Kagan recounted how he, together with the other representatives from the Claims Conference present in The Hague, just came from Warsaw with negotiations with the Polish Government; “*Free, democratic Poland, home of largest pre-war Jewish community in Europe.*” After 17 years of democracy, it has not enacted a single piece of property restitution legislation. He indicated that the Claims Conference delegation left with the hope that they will be able to enter into more substantive discussions.

What is being discussed is that the present Government says there will be no restitution - only modest compensation, a percentage of the actual value of the properties. Mr. Kagan reminded, however that the forms of reparation for dealing with the settlement of property claims should be restitution in natura. Where this is not possible, then it should be compensation based on the full value of the asset. This is an integral part of the process of dealing with the consequences of genocide.

We need to commit ourselves with every fibre individually, collectively, institutionally and governmentally. Seeking compensation by trying to track down the assets of an individual perpetrator will lead to very modest and symbolic compensation only. Unless collectively the 150 signatories to the Rome Statute commit themselves to this (they are in many cases successor governments to those who perpetrated genocide) there will be no serious compensation or restitution.

For the restitution process it is important to develop data and information on the basis of which you can seek out assets which have been taken unlawfully. Legislation is the primary method under which these claims are made. The success of the programme in bringing restitution depends on the thoroughness and effectiveness of the legislation.

To seek compensation by trying to track down the assets of an individual perpetrator, will only lead to a very symbolic package. Unless the signatories of the Rome Statute will commit themselves to provide compensation and restitution to the victims there will be no serious compensation and no serious restitution.

This, he indicated, is the view of someone who is in the 2<sup>nd</sup> half of the 6<sup>th</sup> decade of dealing with this issue.

## **Session VII: Collective Forms of Reparations: How to determine priorities whilst recognising the specificity of harm (Fiona McKay, Shari C. Reig, Mariana Goetz, Yasmin Sooka)**

The session was chaired by **Ms. Fiona McKay**, Chief of the Victims Participation and Reparations Section of the Registry, International Criminal Court.

**Ms. Shari C. Reig**, Deputy Special Master in the Swiss Banks Holocaust Settlement, provided an overview of the case - the *Swiss Banks Holocaust Settlement (In re Holocaust Victim Assets Litigation)* pending in the United States District Court, Eastern District of New York,<sup>14</sup> a case involving the allocation and distribution of a \$1.25 billion Settlement Fund.

As of the date of the Conference, approximately \$950 million has been distributed or allocated on behalf of some 400,000 claimants, nearly all of whom are Holocaust survivors (or in some instances, their heirs). The distributions have ranged from repayment of a Swiss bank account in the amount of approximately \$22 million (to the heirs of what was once one of Austria’s largest sugar refineries - the company and nearly all of the family’s assets were appropriated by the Nazis) - to a monthly food package delivered to an elderly survivor living alone in a village in the Ukraine, a package consisting of pasta, flour, beans, canned fish, rice, sugar and oil.

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<sup>14</sup> The full version of Ms. Reig’s presentation is available online at: <http://www.redress.org/PeacePalace/HolocaustSettlementSR.pdf>. All significant court opinions, reports and other documents relating to the case are available on the Internet at [www.swissbankclaims.com](http://www.swissbankclaims.com)



Shari Reig and Fiona McKay

Ms. Reig's presentation focused on three themes which may be useful to organisers of other compensation programmes, particularly as they move beyond the theoretical concept of restitution and enter the implementation stage. First, given the limits of the fund and the desire to avoid *de minimus* payments, one must consider which people should be eligible for distributions? Second, given the legal constraints and the historical antecedents, which claims should receive priority? Third, given the age of the claimants, the passage of many decades and lack of records, and the limits of the fund, how to simplify the claims process while ensuring that only plausible claims are paid?

The first lawsuit involving Switzerland's Holocaust-era activities was filed in October, 1996, and several more were filed thereafter. These lawsuits were consolidated in March, 1997, in the United States District Court for the Eastern District of New York, before the Hon. Edward R. Korman. The claims asserted included genocide, looting, laundering assets, crimes against humanity, breach of contract, unjust enrichment and others. The actions were brought as class action lawsuits, and the plaintiffs were represented by leading members of the United States class action bar, while the defendant Swiss banks also were represented by major law firms.

After extensive briefing and oral argument of the legal issues, Judge Korman encouraged the parties to commence negotiations in which the Court actively participated. The result of these discussions was an agreement in principle to settle the case for \$1.25 billion, reached in

August, 1998. Following several months of further negotiations, the Settlement Agreement was executed on January 26, 1999, and became final on March 30, 1999, upon the execution of "organisational endorsements" by seventeen major worldwide Jewish organisations as required under the terms of the Settlement Agreement.

Among other provisions, the Settlement Agreement sought the appointment of a Special Master to devise a plan for the allocation and distribution of the Settlement Fund. The Plaintiff's Executive Committee (i.e. several attorneys representing the class) unanimously endorsed Judge Korman's proposal to appoint Judah Gribetz as Special Master on December 15, 1998. On March 31, 1999, Judge Korman issued an order appointing Judah Gribetz as Special Master. Special Master Gribetz's initial task was to develop a Proposed Distribution Plan in connection with the Settlement Agreement. Ms. Reig indicated that she began to work with Special Master Gribetz at that time and subsequently was appointed by the Court as Deputy Special Master.

In devising the Proposed Distribution Plan, the starting point was the Settlement Agreement. The Settlement Agreement created five specific categories of claims - the "classes" - that could be compensated, and also designated specific categories of victims. The five classes are the Deposited Assets Class (those who deposited money and other assets in Swiss Banks prior to or during the Holocaust and who have not had their accounts returned to them); Slave Labour Class I (those who performed slave labour for German corporations whose profits were deposited with or transacted through Swiss banks and other financial institutions); Slave Labour Class II (those who performed slave labour for Swiss corporations); the Refugee Class (those who were denied entry into, expelled from, or mistreated while in Switzerland during the Holocaust era); and the Looted Assets Class (those whose property was looted by Nazis and then disposed of through Swiss banks and other institutions). With the exception of Slave Labour Class II, a class member must be a "Victim or Target of Nazi Persecution," a term defined under the Settlement Agreement as "any individual, corporation, partnership, sole proprietorship, unincorporated association, community,

congregation, group, organisation, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, physically or mentally handicapped."

In accordance with United States class action law, the Court was required to provide notice of the proposed settlement and to determine whether the settlement was fair. Beginning in June, 1999, worldwide notice of the settlement commenced, including mailings in 27 different languages to survivors, heirs and other interested persons. The parties sought written comments as well as relevant personal information from potential class members through "Initial Questionnaires," and approximately 600,000 Initial Questionnaires ultimately were received from around the world. As part of his analysis of the fairness of the settlement, Judge Korman presided over two "fairness hearings": one in New York on November 29, 1999 and the other in Israel by telephone conference on December 14, 1999.

On July 26, 2000, Judge Korman determined that the proposed settlement of the class action was fair, reasonable and adequate and granted it final approval which, however, was conditioned upon the banks' compliance with a variety of requirements set forth in the Court's opinion, including good faith cooperation with the distribution process. On September 11, 2000, the Special Master filed the Proposed Distribution Plan, a two-volume, approximately 900-page document intended to provide all parties and interested observers, including reviewing courts, with a detailed rationale for each allocation recommendation. After a period of notice and public comment, and following a hearing on November 20, 2000, the Court adopted the Special Master's recommendations in their entirety by order dated November 22, 2000. Six appeals were filed from the Court's order approving the Distribution Plan; all but five were withdrawn. On July 26, 2001, the United States Court of Appeals for the Second Circuit upheld the District Court's decision.

#### **Implementing the Settlement: Three Key Issues**

The initial question we faced in formulating our allocation and distribution recommendations was which people to compensate from the \$1.25 billion Settlement Fund. Under the terms of the Settlement Agreement, not only Nazi victims but also their "heirs" theoretically were eligible for compensation. The term "heirs," however, was not defined in the Agreement, although the Agreement is governed by New York law. When we studied the law of New York, as well as that of many other jurisdictions, we learned that the definition of "heirs" is extremely broad, extending to distant second and third cousins many times removed. Given that there were approximately one million surviving victims of the Holocaust at the time we were considering these issues, the number of heirs clearly could reach several million. Moreover, the Settlement Agreement also posed another problem: it applied not only to individuals but, as noted previously, also to organisations, including religious and educational institutions as well as other communal groups.

It is clear that the purpose of these open-ended categories of potential claimants was to obtain the broadest possible releases. It should be noted that although there were only two defendants involved in the litigation - the two largest Swiss banks, Credit Suisse and UBS - virtually all Swiss business and governmental entities were included as "releasees" when the case settled. The releasees' intent was to ensure that virtually all Holocaust-era claims that could be asserted against them would be barred by this Settlement Agreement; thus, an effort was made to incorporate into the settlement all possible claims and all possible claimants.

However, United States class action law as well as simple common sense preclude "token" payments in a case such as this. In fact, Judge Korman has said publicly on a number of occasions that he does not want to just "sprinkle" money or give out "coupons" (as is the case in many United States class action settlements). Certainly no amount of money could ever compensate claims arising from the Holocaust, but the Court's objective at all times was to make the payments meaningful.

Thus, as to heirs, they looked to precedent to try to find a realistic and defensible option for

limiting the potentially vast scope of the potential claimants. They studied the history of Holocaust compensation as well as other programmes attempting to address human rights abuses. They learned that whereas “property”-related compensation covers broad categories of heirs, including distant relatives, compensation for “personal injury” generally is limited to actual victims and their most immediate family members. Thus, for Deposited Assets Class claims alone (which seek the return of specific, identifiable property), payments are made to “heirs” using the broad definition noted previously. In accordance with the precedents they studied, payments for all other claims - for Slave Labor Classes I and II, the Refugee Class, and the Looted Assets Class<sup>15</sup> - are limited to survivors, except where the victim died on or after February 15, 1999.<sup>16</sup>

With respect to the second broad group of potential claimants - organisations - they recommended and the Court agreed that only the claims of individual survivors (and certain heirs) should be compensated. Clearly educational, religious and other institutions sustained immense losses at the hands of the Nazis. Nevertheless, with perhaps one million surviving Nazi victims, they felt compelled to recommend that the Court undertake a kind of “triage” by paying human beings first. The community seems to have accepted this decision, recognising that for the Settlement Fund to have any real meaning, its benefits should be conserved to assist the elderly survivors who suffered personally at the hands of the Nazis.

### Which claims should be prioritised?

The Settlement Agreement created five classes of compensable claims: Deposited Assets, Slave

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<sup>15</sup> Although the Looted Assets Class ostensibly also involved “property” claims, this class presented other unique problems and required a different approach to compensation, as more fully discussed below.

<sup>16</sup> February 15, 1999 was the date selected by the German Foundation “Remembrance, Responsibility and the Future” (the German Slave Labor Foundation), which was negotiated at approximately the same time that we were formulating our own distribution recommendations in the Swiss Banks case. To minimise confusion among survivors and for administrative efficiency, we attempted to adhere as closely as possible to the German Foundation procedures.

Labor Class I, Slave Labor Class II, the Refugee Class, and the Looted Assets Class. Nevertheless, under United States law, not all class action claims are to be treated equally. Indeed, as the United States Court of Appeals for the Second Circuit held in this very case: “Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims.”<sup>17</sup>

In devising the allocation and distribution recommendations, it was imperative to recognise that the Deposited Assets Class claims were unique, historically and legally. They were the foundation of the lawsuits, the focus of public pressure, and the reason for the settlement.

The historical background to the Deposited Assets claims was decades of misconduct during and after the War. As to the legal backdrop, the Volcker Committee investigation had revealed that even with massive document destruction, millions of Holocaust-era records did still exist and valuation of existing accounts was still possible. In addition, these claims were quite straightforward under United States law, drawing upon standard theories of breach of contract and unjust enrichment.

Their distribution recommendations therefore placed greatest priority upon establishing an individualised claims process for Deposited Assets Class claims, a recommendation that Judge Korman adopted and that the Court of Appeals later upheld.<sup>18</sup> The Volcker Committee had calculated that the total value of the accounts “probably” or “possibly” belonging to Nazi victims was in the range of between \$643 million to \$1.36 billion, including interest and at present-day values (i.e. potentially worth more than the \$1.25 billion Settlement Fund).

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<sup>17</sup> *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001) (reissued as a published opinion July 1, 2005).

<sup>18</sup> The “existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting .... [T]hese claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valued in terms of time and inflation .... [B]y contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately value.” *In re Holocaust Victim Assets Litig.*, 413 F.3d at 186.

Yet it was unlikely that all of the Holocaust-victim accounts would be successfully claimed. Therefore, the Distribution Plan recommended that the amount available to the Deposited Assets Class be capped at \$800 million. The remaining \$425 million would be available for distribution to surviving members of the other four classes: Slave Labour Class I, Slave Labour Class II, the Refugee Class and the Looted Assets Class. Payments of Deposited Assets Class claims would be based upon individualised review of the existing bank records as well as examination of claim forms, archival records, and a wide variety of other sources. Every effort would be made to determine and return to claimants the actual value of their deposits (multiplied by interest); if the actual value was unavailable, then the Volcker Committee's estimates of average account values, depending upon the type of account, would be used.

The question that they still confronted, however, was how to minimise the administrative burdens and account for the lack of records, while ensuring that only plausible claims were paid. Ms. Reig addresses that concern, and how they sought to resolve it, below.

#### **How to simplify the claims process while paying plausible claims?**

Given the passage of more than sixty years since the Holocaust, the fading of memories, and the destruction of documents, they believed it was imperative to find a way to simplify the claims processes while still seeking to ensure that compensation would be made only to those with plausible claims. In the absence of that element of plausibility, the Settlement Fund would be depleted and those who sustained losses during the Holocaust would lose whatever satisfaction they might have obtained from finally seeing their specific injuries recognised in some tangible form. Yet if the evidentiary bar was raised too high, virtually no one would be entitled to compensation. Thus, they tried to strike a balance by heavily favouring the claimant while requiring certain minimum levels of proof, depending upon the class and the nature of the claim. She provides three examples below.

#### **The Deposited Assets Class and the "Adverse Inference"**

On the one hand, there had been massive and often deliberate destruction of bank records relating to Holocaust-era accounts: there were no records for 2.7 million accounts (i.e. over one-third of the deposits), and those records that did remain were sometimes sparse. On the other hand, millions of other records continue to exist, and these are sufficient to show that an account had been open or opened during the Holocaust era; who owned the account; how much it had been worth; and other information. What often is missing from these records, however, is evidence showing whether the account had been closed, and if so, by whom. They knew from the findings of the Volcker Committee and the Bergier Commission that the absence of this data was not surprising, given the banks' history of compliance with forced transfers (i.e., "authorised" transfers by account owners actually made under Nazi duress), as well as the banks' post-War record of closing out accounts by taking them into bank profits.

The solution to this evidentiary dilemma was actually quite straightforward, requiring only that the Court apply a standard principle under United States law and presumably available under other legal systems as well, that of "spoliation." That principle provides that a party who has caused the destruction of documents, and who knew or should have known that the documents would be relevant to litigation, should be held responsible for their destruction. An "adverse inference" may be taken against that party, in that it will be presumed that the evidence destroyed would have been unfavourable to the person causing its destruction.

As applied to the Deposited Assets Class claims process under Rules adopted by the Court, the claimant is entitled to an adverse inference and thus receives the benefit of the doubt. In the absence of bank records or other evidence to the contrary, where there is no information showing what happened to the account, the Claims Resolution Tribunal presumes that it was closed improperly. It is assumed that the account owner did not receive the proceeds, and the claimant (the account owner or his/her heir) receives an award. As of the date of the Conference in The Hague (1-2 March 2007), the

average Deposited Assets Class award is approximately \$135,000.

The spoliation/adverse inference principle also has been utilised in another way: it underlies the Court's decision to accept their recommendation to authorise awards on the basis of "Plausible Undocumented" claims. Given that the Swiss banks destroyed the records for over one-third of Holocaust-era accounts, and also given limitations on access even to the still-existing accounts,<sup>19</sup> it would be unfair to penalise claimants for whom bank records cannot be located. Thus, each of the approximately 105,000 Deposited Assets Class claims has been carefully reviewed by claims administrators. Those determined to be plausible in accordance with fixed criteria including the nature of the relationship between the claimant and the account owner, the account owner's connection to Switzerland, the claimant's (or owner's) prior attempt(s) to retrieve his accounts from Switzerland, and other factors, receive compensation in the amount of \$5,000.

#### **The Looted Assets Class and the "Cy Pres" Remedy**

As they considered options for the Looted Assets Class, they were confronted with several realities. On the one hand, the class was potentially vast, because unquestionably all Nazi victims were looted, whether by German officials, local authorities, or their own neighbours. Looting took place whether the victim had fled to safety or had been murdered in a concentration camp. On the other hand, there is no responsible way to determine what property was lost, to whom, in what amount, and where it ended up. Yet the Settlement Agreement required some connection to Switzerland. Thus, if they had recommended an individualised claims facility, few if any claimants would have had sufficient proof to demonstrate what they had lost, what it had been worth, and most significantly, whether it had been transacted through Switzerland. Further, the administrative costs of such a process would have overburdened the

<sup>19</sup> These limitations on access include restrictions on viewing certain account data; the requirement that various data be redacted before claims administrators can review particular bank records; and, as noted previously, lack of full access to the "Total Accounts Database" (the 4.1 million accounts that still exist).

Settlement Fund. Alternatively, if they had disregarded the "Swiss connection" and simply divided payments pro rata among all eligible claimants, compensation would be *de minimus*.

Instead, they proposed and the Court adopted a third option: the distribution of Looted Assets Class compensation under a *cy pres* remedy. Under United States class action law, the *cy pres* doctrine (meaning "the next best thing" or "as near as possible") permits the Court to authorise compensation other than direct cash payments to class members. The United States Court of Appeals for the Second Circuit - the jurisdiction in which this matter is pending - has held in the context of the Vietnam-era *Agent Orange* product liability class action that where a settlement fund cannot "satisfy the claimed losses of every class member," it is "equitable to limit payments to those with the most severe injuries" and to "give as much help as possible to individuals who, in general, are most in need of assistance."<sup>20</sup>

Therefore, the Looted Assets Class compensation programme, unlike the programmes for the other four classes, is not based upon individualised proof of claims but, rather, provides for assistance to the very neediest Holocaust survivors - all of whom are presumed to have been looted. Using existing charitable agencies in most cases (but in the case of Roma victims often requiring the establishment of new systems), the Court has allocated \$205 million for multi-year humanitarian assistance programmes around the world, with particular emphasis upon the very neediest victims in the former Soviet Union and Central and Eastern Europe. "Claimants" must show only that they were Nazi victims and that they are needy, not that they were looted or what they lost. "Need" is based upon demographic, mortality and social welfare data, including the existence of social safety nets. As of the date of the Conference, over 200,000 of the neediest Nazi victims have received humanitarian aid funded by the Court, especially food, medicine and winter relief.

<sup>20</sup> *In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 158 (2d Cir. 1987); see also *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005); *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 96-97 (E.D.N.Y. 2004).

## Slave Labour Class I: Presumption of a Swiss Connection to the Proceeds of Slave Labour

The third and final example of their attempt to simplify the claims process is their recommendation for Slave Labour Class I. Once again, they were confronted with the language of the Settlement Agreement, which apparently required former slave labourers to show that the proceeds of their labour were transacted through Swiss banks or other entities. While there are hundreds of thousands of surviving former slave labourers, many do not even know the name of the company they worked for, much less where the profits of their labour ended up.



Shari Reig and Julian Guerrero

They studied the economic history of the Holocaust, an area that continues to develop as new information and documentation become available. They learned that slave labour was pervasive across all of Nazi-occupied and Nazi-allied Europe, and that literally thousands of enterprises made use of slaves during the Holocaust. They further learned that there were extensive ties among German slave labour-using companies, the Nazi Government, and Swiss financial institutions. In particular, after months of negotiations with the defendant banks and the assistance of the Volcker Committee and the Swiss Federal Archives, they obtained a copy of the 1945 “Frozen Assets List” - representing a freeze of German assets instituted by Swiss authorities at the behest of the Allies, undertaken as the impending Allied victory was becoming clear. The list demonstrates that hundreds of German companies known to have used slave labour, as

well as the German Government itself, held Swiss bank accounts as of 1945.

Accordingly, they recommended and the Court adopted the presumption that the proceeds of all slave labour were transacted through Switzerland. The Court further presumed, based upon the historical evidence, that all who performed slave labour for the Nazi regime (assuming they were also “Victims or Targets of Nazi Persecution,” as previously described) were members of “Slave Labour Class I” and so were entitled to compensation. There was no need for an elderly Holocaust victim to prove where she had worked, what she did, or for how long, and certainly no need to show where the profits from her labour had gone.

The significance of that presumption was that it enabled the Court also to adopt their further recommendation essentially to “piggyback” on the claims processes that were about to be implemented by the German Foundation to compensate slave and forced labourers for the Nazi regime. Rather than require Holocaust victims to understand and adhere to two essentially parallel claims programmes, they utilised the same administrative agencies and methodologies, including even the same claim forms, to streamline procedures and conserve administrative expenses. As a result, as of the date of this Conference, the Court, through its agents (the Conference on Jewish Material Claims Against Germany and the International Organisation for Migration) has been able to compensate more than 195,000 former slave labourers, for a total of more than \$283 million.

## Concluding Remarks

One element of their compensation programme is perhaps incapable of replication: the fortuity that the case is pending before a jurist as compassionate and courageous as the Hon. Edward R. Korman, who was willing to tackle and overcome what others might have viewed as insoluble dilemmas to bring some measure of justice to survivors of the Holocaust. Other courts have declined to take on this task. For example, slave labourers tried to sue German companies in the 1960s. A case against the major slave labour-using enterprise IG Farben was rejected in 1966. The United States District Court in that case held that the:

*“span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasons is too indefinite. The procedure sought - adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power - is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.”<sup>21</sup>*

Ms. Reig indicated that she and her colleagues have had the great privilege over these years to have learned something of the personal histories of thousands of individual survivors of the Holocaust. They became acquainted with one of the more poignant and ironic of these stories while reviewing proposed awards for claimants with plausible undocumented Deposited Assets Class claims. In the fall of 2006, the Court authorised an award of \$5,000 to a Holocaust survivor who plausibly had demonstrated that her family had had a Swiss bank account that was never returned. She also had been a former slave labourer and had received a separate payment under Slave Labour Class I. Her daughter is a professor and she sent us her research concerning resistance efforts in the concentration camps. Her mother (the claimant) and aunt had been saved by this “resistance” - by the concentration camp inmates who, at great personal risk, had warned them to lie about their ages, about whether they were twins, and so forth, to avoid “selection” and thus avoid immediate death in the gas chambers.

The professor’s mother - who received compensation under the Swiss Banks settlement because of the difficult claims process Judge Korman was willing to undertake - happens to have been one of the plaintiffs in the IG Farben case: the very case that was dismissed in 1966 because the claims seemingly presented so many obstacles. Now, forty years later, this Holocaust survivor finally has received some measure of compensation for what happened to her in Europe in the 1940s, because a United States federal judge concluded in the 1990s that justice was long overdue.

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<sup>21</sup> *Kelberine v. Societe Internationale, Etc.*, 363 F.2d 989, 995 (D.C. Cir. 1966).

**Mariana Goetz**, REDRESS Advisor, ICC Programme provided a review of best practice in the implementation of collective reparations.

The notion of *collective* reparations has resonance in the context of mass violations of human rights and humanitarian law. As gross violations of individual and group rights entitle victims to an effective legal remedy and to reparation, it would appear that in situations of widespread suffering, collective solutions might prove practical or appropriate. While there may be great benefits in collective reparations, there are also dangers that collective forms of reparation, such as the building of hospitals or schools for the benefit of victims, might easily lose their reparative objective, becoming humanitarian or developmental in nature given the parallel needs of rebuilding societies torn apart by war or widespread criminality.

Thankfully we now have the 2005 *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, which provide an international bill of rights for victims. Goetz draws together some of the concepts and principles regarding the *implementation* of collective reparations specifically. As has been seen through the preceding presentations, there are certain building blocks that one can perhaps pull together into an operative framework.

Our starting point must be that, in attempting to determine appropriate reparations, the process must, as far as possible, be nourished by the requirements of victims themselves. It must be victim-led. In this manner, there can be no one-size fits all solutions. Every situation and set of victims will organically reveal different considerations, needs and requirements.

It helps to look at this victim-centred approach in two phases: from a perspective of *procedural justice* on the one hand and *substantive justice* on the other. For victims, justice is an experience. It is as much about the way that they are treated, consulted and respected *procedurally* throughout the reparation process, as it is about the substantive remedy, material or otherwise, they may be granted as part of the end result.



The procedural handling of the reparations process plays an important role in ensuring that the process is well received and accepted; indeed that the process is *owned* by victims and that it *empowers* them as survivors, eventually reinstating dignity, respect and their rightful place in society. Ensuring that the process is a ‘just’ process will largely influence victims’ experience of reparations. Indeed the treatment, involvement and empowerment of victims in the process can, in and of itself, constitute a valuable part of the reparative package. The process can restore a sense of significance, dignity and strength.



Mariana Goetz

In this respect the relationship between the legal remedy and the reparation can be of key significance. For instance, if an administrative settlement is offered in the absence of an effective legal process (or acknowledgement of wrong-doing), monetary awards may become “dirty money” in the eyes of victims, as was the case in Argentina. From the dirty war, we had “dirty money”. In such cases the award might be perceived as merely means to silence and appease victims without genuinely redressing the harm suffered.

Thus, as a matter of principle, the *process* should set out to do justice to the victims.

So, as the judicial or reparation process can constitute a reparative end in itself, the process is of-course also a means to an end - a means to obtaining a substantive result. And, the quality of the substantive result, in terms of its ability to redress all victims, and to balance different levels of harm, will depend to

a large extent on the thought and energy put into ensuring an inclusive and effective process.

#### Consultation & Outreach

According to a UN Report on Justice in Conflict and Post-Conflict societies, “the most successful transitional justice experiences owe a large part of their success to the quantity and the quality of public and victim consultation carried out”.<sup>22</sup>

The issue of appropriate *quantity* of consultation should not be overlooked. The very nature of widespread and systematic violations implies that the harm to be addressed is not sporadic or isolated. There will be a vast beneficiary group to be redressed, with multiple layers of harm suffered by most victims. Furthermore, the very context of mass criminality and violence often implies a humanitarian crisis with vast populations either displaced or refugees in neighbouring states. Thus, there are great challenges in terms of sheer numbers and accessibility, particularly in the humanitarian context.

In order to ensure *qualitatively* satisfying consultations, one must recognise that in most cases, victims in conflict situations in Africa are disenfranchised, dispossessed and difficult to reach. In addition they may have been subject to manipulation by a variety of actors and may have negative associations or mistrust for outsiders (or foreigners) or scepticism towards courts and “justice” processes in general. There will be multiple cultural, ethnic socio-economic, gender and language barriers in ensuring the quality of consultations.

Thus, special attention needs to be given to the methods and means of communicating with affected populations, particularly in order to reach the most vulnerable of victims, who may be women, children, elderly and/or illiterate.

Consultation and outreach are two-way processes - they involve ***engaging with people***. In addition to simply providing information, there will be a need to build trust and confidence, ensure inclusive and participatory fora for veritable exchange, and the need to support their empowerment.

<sup>22</sup> UN Secretary General’s Report to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 2004. S/2004/616.

### Participation and Access

In order for victims to be in a position to negotiate or identify the types of remedy to be granted, particularly in the case of non financial reparations, it is vital for victims first to have a clear understanding of the process itself and to remain informed of all the key decisions that affect their interests. In the humanitarian context this will be easier said than done as local languages, dialects, access routes and security issues are critical obstacles that may only be overcome with creativity, reliance on local knowledge and the building of partnerships on the ground.

Other access issues that may need to be considered are the nature and format of application forms, which need to be sensitive and applicable to the context, available in local languages understood by victims.

Often victims will be put off wanting to apply to participate in a programme because of the requirement of completing a form, which they may be psychologically unprepared to do. Thus, the availability of trained social workers or other individuals able to assist victims in completing such forms may play a significant role in promoting wide access to existing programmes.

The manner of filing and transmitting forms are also worth noting. If time frames are set that are too narrow or if forms have to be submitted in person these may also be prohibitive.

### Evidentiary barriers

To begin with, evidential thresholds should not be set too high and creative sources of evidence might be used to corroborate the victims' testimony, such as media archives, NGO records, etc.

Where medical or psychosocial reports may prove useful both for the victim and for the reparations process, the establishment of a special medical or psychosocial unit might be considered to carry out this task. For instance the Moroccan IER established an in-house medical unit, designed not to replace the need for other medical services but, *inter alia*, to provide a comprehensive study of the medical conditions of victims participating in the programme, and to identify particularly urgent

cases requiring immediate attention prior to the completion of the reparations process. A similar approach could be taken with respect to psychosocial assessments, which would also be able to contribute to the identification of appropriate remedies.

Examples of creative approaches to evidential challenges include an interesting decision by the Commission on Illegal Detention and Torture in Chile,<sup>23</sup> that all persons who showed that they had spent time in certain detention centres were presumed to have been tortured.

Thus, creative approaches to evidentiary questions must be put in place, to avoid victims' undue inconvenience, humiliation, double victimisation, and lengthy, complicated or expensive procedures. This would apply for instance to the requirements of proving indigence in order to qualify for legal aid. The mere fact of showing displacement, refugee status, or simply residence in an area where average income is less than 1 dollar a day (as is the case for Eastern Congo, Northern Uganda and Darfur) should suffice to provide a presumption of indigence.

### Substantive Awards

Collective reparations may arise in two ways:

First, victims' rights to a remedy and to reparation include both individual rights, for individual crimes suffered; and group rights, for crimes inflicted upon a specific group. In situations of mass crimes, collective reparations may be awarded for individual victimisation and, or group victimisation, if harm was inflicted on a specific group. Thus collective reparations may arise to repair numerous individual violations or a group violation.

### Specificity of Harm

Collective reparations require very careful consideration of beneficiary groups and sub-groups. As individual victimisation gives rise to reparation for the specific harm suffered, it is important to ensure that if reparations address large classes of individual victims, the specific harm suffered by particular individuals should not get ignored in the group settlement.

<sup>23</sup> Informe de la Comisión Nacional sobre Prisión Política y Tortura (Santiago, 2005), highlighted in Pablo de Grief's paper on the implementation of Reparations, 2006.

For instance, survivors of sexual violence who have contracted HIV or amputees who are crippled, or children who were forcibly recruited as child soldiers may require specific recognition over and above the fact that they were forcibly displaced and dispossessed. Thus, in identifying collective reparation programmes it will be important to categorise victims in order to ensure that categories of specific harm are recognised and redressed.

#### Examples of Collective Reparations

Collective reparations fall into two broad categories, those requiring financial awards, and those of more symbolic or rights based nature.

- Non-financial Reparations

While judicial remedies and reparative processes are often conceived of as two separate and unrelated processes, this need not be so. In fact, the important jurisprudence of the Inter-American Court of Human Rights, has in recent years increasingly identified wide ranges of reparative measures pronounced in its judgments that are of a collective nature.

The collective measures awarded by the Inter-American Court are of significance given that the ICC may or may not be able to afford individual compensation awards for all eligible victims. The Inter-American approach to calculate harm takes into account the widespread poverty in Latin America, and is principally based on the present value of the victim's expected lifetime earnings, minus projected expenses, had he or she lived. Where victims were unemployed or employed in the informal sector, the Court presumes that their annual income would have been equal to the minimum wage. As a result, the Court generally awards no more than 30 to 35,000 USD for the total present value of the victim's lifetime lost earnings. However, given the inter-ethnic dimension of the conflicts under the jurisdiction of the ICC, which often involve land or conflict over other resources, awarding economic damages to one group and not another may simply re-ignite violence and thwart possibilities of lasting peace.

In any case, collective remedies, as a matter of principle, in addition to or instead of individual

compensation are of significance in their own right.

#### **Publicity of Judicial Remedies**

A first collective measure of satisfaction used by the Inter-American Court concerns publication of its judgments.

Judicial remedies can have a reparative impact. This may seem obvious, but one needs just to consider the judgments of the Rwanda or Yugoslav Tribunals to note the generalised omission of reparative elements. In fact, the reparative impact of a judgment can be magnified in a number of ways, which in themselves can constitute forms of collective reparation. The Inter-American Court has ordered States to publish portions of its judgments in official gazettes and popular newspapers in 19 cases since 2001. In the case of a massacre of indigenous villagers, the Court ordered Guatemala to translate the judgment into the local Mayan language and to deliver copies to each victimised survivor and family member.<sup>24</sup> Judge Garcia Ramirez explained that publication in this manner sought to provide:

- 1) moral satisfaction of the victims or their successors, the recovery of honour and reputation that may have been sullied by erroneous or incorrect versions and comments;
- 2) the establishment and strengthening of a culture of legality for coming generations, and
- 3) the truth to those who were wronged and to society as a whole.<sup>25</sup>

Other forms of collective reparation, which have been ordered by the Inter-American Court, (which might fall under "satisfaction" or "guarantees of non-repetition"), include ordering States to:

- "effectively" investigate cases in order to identify, put on trial and punish actors;
- Remove all obstacles and mechanisms, whether legal or de facto that

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<sup>24</sup> Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in M. Bossuyt, P. Lemmens, K. De Feyter, and S. Parmentier, eds., *Out of the Ashes: Reparations for Gross Violations of Human Rights* (2006).

<sup>25</sup> Idem.

- perpetuate impunity for the perpetrators;
- Provide security for judicial authorities, prosecutors, witnesses, victims as well as the victims' family;
- Undertake a public act to honour and dignify the memory of the victims (including the naming of plazas, streets or commemoration days).

Thus, these are a number of forms of collective reparations that can be called upon. Recommending some of these measures, particularly those relating to ending impunity, may constitute innovative interpretations of the ICC's complementary nature to national jurisdictions.

- Reparations with Financial Implications

Most importantly, in the humanitarian context, it will be important to ensure that medical, psychosocial rehabilitation, educational or other programmes are distinguishable from general humanitarian, development or relief efforts. The role of collective programmes of this nature is not to replace or indeed pioneer humanitarian remedies, it is to repair specifically the harm and suffering endured, which may or may not include generalised health, educational or other facilities that can be used by all the population.

Something Ms. Goetz noted in her recent trips to affected areas in Northern Uganda and Eastern Congo, is that programmes specifically designed to redress victimisation need to take the views of victims themselves into account (and not only or necessarily or specifically those of their representatives). Victims' perceptions of their needs often differ greatly from community leaders' perceptions, who are invariably more politically conscious of ensuring widely inclusive programmes or peace building as oppose to addressing the suffering of particular minority groups. In this respect, reaching and involving women victims is crucial given their general marginalisation in many societies and the particular social stigma and prevalence of sexual violence in many conflicts.

**Yasmin Sooka**, Director of the Foundation for Human Rights in South Africa and former Commissioner of the South African and Sierra Leonean Truth and Reconciliation Commissions commented on the approaches taken by these Commissions in respect of reparations.

In South Africa, the Promotion of National Unity and Reconciliation Act 34/1995, importantly in mandated the Truth and Reconciliation Commission to develop measures of the provision of reparations for those found to be victims of gross violations of human rights. The preamble of the Constitution, which led to the Commission's establishment, also provided for a conditional amnesty. Perpetrators had to make applications to an amnesty tribunal made up of judges. They had to make full disclosure and they had to prove that the crime they had committed had been committed in pursuit of the aims and objectives of a political party or the state. Taking into account the principle of proportionality victims were allowed to be present and to oppose the applications, they were also provided with legal aid, and the right to cross-examine the perpetrators.

The Beco family however, challenged the constitutionality of the amnesty provision. The newly established Constitutional Court ruled that the amnesty provisions were valid and were the cornerstone of the negotiated settlement which had led to peace in the country. The judgment however, noted that the postamble of the Act had provided not only for amnesty but also for a reparation process.

The Commission was made up of three committees. The Human Rights Violations Committee was responsible for investigating human rights violations of the past, for taking statements and creating opportunities for victims to give their testimonies at public hearing and also for the historical account of the conflict and what the causes of it had been. The Reparations and Rehabilitation Committee was responsible for the development of reparation and rehabilitation policy for the Commission.

The TRC legislation established a special fund called the President's Fund, administered initially by the Ministry of Justice. All funds for reparations that were provided by the Government, donor countries and many

institutions and individuals were placed inside the fund. Whilst Ms. Sooka's presentation did not focus on the normative framework for reparations, she mentioned that the TRC did take account of the Basic Principles and Guidelines of the Right to a Remedy and Reparations as well as the judgments of the Inter-American Court. One of the most important issues in how the TRC conceptualised the reparations framework was that the dead can never come back to life and the unjustly imprisoned will not get the lost days of their lives back. The most that the TRC can do then was to ease the suffering of the living, to acknowledge the losses they have sustained and to bring to justice the perpetrators.



Syl Fannah and Yasmin Sooka

One of the flaws in this process was that only those victims that came before the Commission, either by making statements or appearing before its hearings, were able to be designated as victims for the purposes of accessing reparations.

22,000 statements were finally taken, however the classical guiding principle of *restitutio in integrum* (restoration to original condition) could not be followed, in cases of gross and systematic violations, in a context of transitional justice. In a country like South Africa, if you have been brought up under the apartheid system then you were denied access to education by law, denied employment opportunities on the basis of race, and you would certainly not want to return to this oppressive regime, you want something better. This is an important point to take into account, particularly with developing countries emerging from conflicts.

The TRC also developed the notion of fair and appropriate reparations. In South Africa, as it is not possible to wipe out the consequences of the violations, it is better to have recourse to what the TRC termed 'fair and appropriate.' This can be defined as taking into account the overall transitional context in which reparations are taking place, the available resources available for reparations and the other transitional mechanisms taking place in the country. Fair reparations require that the distribution is done in a fair manner and here the rights-based approach of the participation of all, the accountability to victims and democratic process, the question of non-discrimination, the empowerment of victims and making the linkages between the different areas of reparations are all important. Appropriate reparations refer to the form and modality of the reparations being suitable given the nature of the victims, the violations and the impact on the broader society. It also includes the optimal use of the resources available and will include both collective and individual reparations.

One of the first steps taken by the Commission was the establishment of a database to capture the information gathered through the statement taking process as well as the investigations and research. Given the nature of the contested political space the TRC occupied we knew that every statement we took and every finding we made would be the subject of scrutiny as many political parties would take us to court over the issue. Of course the final narrative of the history of the conflict was certainly arrived at in a contested environment but this was the first step in the reparations process - establishing the truth, giving victims the opportunity to speak out and be heard, having their stories acknowledged as well as providing the historical context of the conflict.

The statement taking process had captured vast amounts of information including the violations and harm suffered but the Reparations Committee held national and provincial consultations throughout the country with both human rights and victims groups on what the key principles and contents of the reparations programme should be. They also carried out a survey focusing on the 22,000 victims, taking statements from them in order to establish the

consequences of the violations and the harm suffered, as well as the status of the families left behind.

The individual monetary package involved a lump sum in the form of a pension to be paid over a period of five years. The Government when it finally dealt with reparations decided to pay out a fraction of that amount in one lump sum. The collective reparations package was access to medical health and welfare benefits including trauma counselling and bursaries for the children of victims. It also included community reparations for those communities most affected by the violence and symbolic closure ceremonies.

The mandate of the Commission had defined the gross violations to include killings, torture, abductions, and attempts, conspiracies and plots to carry out the first three categories as well as the category of severe ill-treatment. The category of severe ill-treatment became quite a contested area as many victims and groupings tried to widen the narrow mandate of the Commission to include economic and social violations. This had to be curtailed in order to prioritise the victims of the other categories.

There are then important questions the TRC had to ask about who is a victim; how do we assess the impact of a violation on the life of an individual; is it possible to separate the abuse from the other aspect of the person's life and is it possible to make as accurate assessment of the impact without understanding the full context; how can we conclude what a person's life might have been like had the violations not occurred. The reparations committee also recognised that the vast majority of black victims in South Africa had been living with poverty, legalised discrimination on the basis of race, lack of access to the economic resources of the country and daily humiliation and disrespect.

The committee also recognised that oppression, racism and humiliation have serious consequences, not just for the individual but for society at large. This has raised the question of social injustice not only of the first family but also of the community and an important factor was the inter-generational trauma felt by successive generations.

With regard to the issue of individual or collective reparations, Ms. Sooka submitted that there is not a firm rule except the notion that in designing a programme there is a need for flexibility, creativity, practicality and multiple strategies all of which we try to convey in the elements. In the South African instance the TRC opted for the multi-pronged strategy but they were deeply conscious of the need to improve the quality of life for the victims and their families. So the collective reparations took into account the access to medical health and welfare benefits, housing, institutional reform as well as access to counselling and bursaries for the children of victims. Community reparations have not yet been dealt with and it is an issue before the Government at this point. However, symbolic closure ceremonies including reburials and exhumations, the continued work on disappearances, memorials, traditional and cultural specific methods of mourning and closure as well as the placing of grave stones are all occurring.

In South Africa both direct and indirect victims were recognised and often this involved mediations with families who were eligible and also complex multiple households where there is more than one wife, where there is more than one family with children. There was also recognition of women who headed households including grandmothers bringing up children and a recognition of widows as well. However, some challenges that the commission had to deal with included the argument from the Government that the reparations policies should be symbolic as most black South Africans were the victims of apartheid and should benefit from the development policies that the Government was establishing; the TRC argued against this. The Government also attempted to argue that it was the successor state to the apartheid government and should not have to pay for the sins of the former, however the obligation is for the state to take responsibility. The Government also argued that the list of victims coming to the Commission should be closed, this was a huge mistake because it did not consider that the healing of the society is a long term process which requires a long term commitment to reparations, taking into account that the consequence of a violation can manifest itself many years after the Commission has come and gone.

The risk with collective measures in many countries that are emerging from conflict is that governments become confused between reparations programmes and development. In the case of South Africa many blacks had not been the recipients of medical, health, welfare, and education benefits. The new state also became a constitutional state and instituted other bodies to deal with reconstruction and development, equality issues, affirmative actions and land restitution.

In Sierra Leone there was the Lome Peace Agreement in 1991 which was to address impunity and respond to the needs of victims to promote healing and reconciliation and to prevent a repetition of the violations. However, in 1998 the terms of the peace agreement were violated and the President requested the UN Security Council to set up a Special Court to prosecute the RUF. The Court was established but it was not limited to the RUF, it also looked at those that bore the greatest responsibility. The violations that characterised the war in Sierra Leone included amputations, rape and sexual abuse, the abduction of children, the conscription of child soldiers, slavery, forced marriages and forced cannibalism. The Lome agreement, which pledged the establishment of a truth commission and provided for victims to tell their stories and make provisions for their rehabilitation, made no mention of the word reparations. However article 28 made provision for reconstruction, resettlement and rehabilitation and also mentioned that women should be accorded special attention. Article 29 provided for a special fund for the rehabilitation of war victims but it went further and provided that the proceeds from the sale of diamonds were to be earmarked for the development of the people of Sierra Leone and that it should include compensation for incapacitated war victims.

Once the Commission began its work it became very clear that the victims expected the Commission to deal with reparations. The Commission thus articulated its view, in the report to the Government, that a reparations programme would have the potential to restore the dignity of victims whose lives have been most devastated to move beyond the position that they are currently in as a consequence of the war. The Commission was cognisant of the

economic reality of Sierra Leone, it conducted a survey of what the needs of victims were, it held widespread consultations with civil society including the transitional justice working group and women's groups. It established that most of the significant projects that were taking place in the county were being carried out by donors. For example, resettlement for amputees and the war wounded was being carried out by Norwegian Relief Council, UNDP and the Catholic Relief Agency.

In terms of prioritisation of collective reparations we focused on vulnerability. We also had to deal with the common problem with the TRC that there is a perception that more money is paid to the perpetrators.

Another issue was making women self-sufficient economically and giving access to medical care. There was a stigma around the issues of HIV/AIDS and with the children resulting from rape, particularly within the wider family unit. Sometimes the transition in many countries is the one opportunity when you can deal with improving the quality of life for women, you can actually deal with laws that are oppressive to women and begin the process of creating new institutions and changing laws. For most of the NGOs in Sierra Leone, they saw that this was the most important contribution that the Commission could make, on the cultural and traditional rights of women.

## **Session VIII: National Challenges in Ensuring Reparations for Victims: Key Examples (Carla Ferstman, Syl Fannah, Florence Ochola, Julián Guerrero)**

**Carla Ferstman**, Director of REDRESS, chaired this session.

**Mr. Syl Fannah**, Executive Director of the National Commission for Social Action (NaCSA), Sierra Leone, reviewed the progress made by the Government of Sierra Leone in addressing reparations.

Mr. Fannah provided a brief review of the civil war in Sierra Leone, and its consequences. He explained that the Truth and Reconciliation Commission (TRC) was set up by Government in 2002 to enhance forgiveness, reconciliation and to consolidate the hard earned peace. The TRC submitted its final report on its findings in 2005. Reparations for war victims, especially singling out amputees and severely war wounded, raped victims, orphaned children and widows, was a key recommendation by the TRC to Government for implementation by NaCSA.

Following the Government's acceptance of the report and to register its commitment to it, the Government established a Cabinet sub-committee which granted all registered amputees and war wounded access to free medicare facilities, government public transport facilities and free education for their children. In early November 2006, the Government granted formal approval to NaCSA to implement the reparation programme as recommended by the TRC. NaCSA therefore finds this Conference very timely as an important forum for experience sharing as we gear up for the challenge.

The operational context has impacted negatively on the timely implementation of the Reparations programme, as conceived by the TRC, in Sierra Leone since the report was produced. Sierra Leone was a collapsed state with no functioning institutions (both public and private), massive displacements of its population and complete breakdown of its socio-economic infrastructure. Every facet of society was affected by the war and it has taken enormous effort at conceptualising and designing approaches and programmes to restore the basic institutions that will regulate society and contribute to the rebuilding of social capital within communities.

One of the outcomes of this process was the assumption that every Sierra Leonean living in the country during the war was a victim, though some were more severely affected than others. Therefore an interim strategy of community based assistance was adopted which will restore basic services and livelihood systems in all communities so as to create the enabling environment for the millions of displaced

persons to return and rebuild their communities and restore normal communal life.

Clearly the achievement of national reconciliation between victims and perpetrators of the war requires far more than this. Indeed in the area of reconciliation and reintegration one must look at the combination of NaCSA and the National Committee for Disarmament, Demobilisation and Reintegration's (NCDDR's) mandate in order to have a full understanding of Government's resettling and reintegration strategy. Essentially, NCDDR was mandated to provide targeted assistance to ex-combatants in order to fulfil Government's obligation under the Lomé Agreement and to facilitate their peaceful reintegration back into civil society, hence stabilising the peace process. In contrast NaCSA was mandated to provide recovery and reintegration support to the civilian element of society: the displaced, returnees, host communities, youths, women and the disabled. Naturally the needs and demands of post war Sierra Leone were far greater than can be met by NaCSA and NCDDR alone and hence Government sought assistance from friendly governments and its international development partners at every juncture to contribute to the challenge.

The creation of this space for Civil Society groups (NGOs in particular) provided an opportunity to mobilise external resources in the form of expertise and funds which were in very short supply immediately after the war.

On another note Mr. Fannah commented on the criticism often levied at Government for buying the guns from the combatants as a compensation for their atrocities. He informed the Conference that "*we never won the war in the battle field but rather around the table.*" Therefore, given that the combined forces of ECOMOG, UNAMSIL, the Executive Outcome of Southern Africa, the Civil Defense forces and the British Armed Forces could not comprehensively defeat the RUF, who had been joined by a majority of the Sierra Leone Armed Forces (RSLAF), the Government had no choice but to buy the guns (not compensate) from the rebels to break the command structure of the RUF. On a scale, it was considered a small price to buy guns from 70,000 armed elements to provide respite to the 4.8 million civilians whose lives had been shattered by the 11 year



war. With this strategy 2.5 million IDPs and 350,000 Sierra Leonean refugees have been successfully resettled and reintegrated into their communities. This did not preclude the establishment of mechanisms to address impunity and human rights, hence the Special Court which has indicted “those who bear the greatest responsibility for gross violation of human rights.”

The TRC was therefore just one of several on-going consultative and participatory processes during the transition period which fed into the wider policy and planning processes that were going on simultaneously in the country to ensure recovery and sustainable peace. These included the National Recovery Strategy (NRC) the Poverty Reduction Strategy Paper (PRSP), the Decentralisation Programme, The UN Country Strategy, The Special Court, etc. The Government therefore had to respond to various issues and recommendations within the framework of the available resources and expertise that will further consolidate the peace process and enhance development.

Mr. Fannah indicated that they have come a long way from the war to a transitional phase in the development process that was guided by the fundamental principle of preventing the recurrence of the war. The Government has embarked on various reform processes simultaneously which are aimed at addressing the root causes of the war, bad governance, politics of exclusion, marginalisation of the youths, bad economic policies, etc. These reform processes have centered around the following key areas:

- ❖ Retraining and equipping of the army and the police
- ❖ Civil service reform and capacity building
- ❖ Supporting decentralised local governance
- ❖ Reforming the legal and judicial system
- ❖ Macro-economic reforms in the areas of procurement, revenue generation, public expenditure tracking, privatisation of State Enterprises and trade liberalisation

Having addressed the institutional reform issues, the Government has now turned its attention to the reparations programme. The delay in implementing the reparations since the presentation of the TRC report, is not due to a down playing of the right to reparation for the severely affected war-affected victims but rather to a combination of problems and challenges, some of which have been highlighted already.

There are several key factors impacting upon the delay in the implementation of the reparations programme:

- The delay in publishing the TRC report, after it had been publicly presented to H.E the President caused donor interest to wane and the loss of confidence in the process by the victims and civil society groups. It created suspicion that the Commission was under pressure from the Government to review and/or change some of its findings and recommendations.

- There was a lack of clarity on the mechanisms and lead government agency to set up the Trust Fund. Whilst the TRC recommended NaCSA to implement the programme, a Cabinet Paper established a Ministerial Sub-committee to oversee the reparations in the country whilst a White Paper later on only accepted the recommendations on reparation in principle. NaCSA, with its best of intentions could not therefore take the lead, which sent signals of inertia to the victims and the international community. The process was therefore ossified and the TRC report was seen as an end product in itself rather than a process aimed at addressing transitional justice issues to consolidate and sustain the peace in the country.

- The weak capacity of Government to address what is essentially a new phenomenon in the country within the context of a brain drain, competing demands on meagre resources by other traditional sectors and the lack of technical know-how and experience in using UN, International and Regional Human Rights instruments to achieve reparation.

- There was confusion between the social reconstruction and rehabilitation programmes that were being carried out by the Government

and its development partners with the concept of reparations to victims, which is enshrined in International Law. Hence reference was made to the various social delivery programmes of government, the amputee houses constructed through the Norwegian Refugee Council, the activities of NACWAC on War affected children, the Women/Girls in Crisis projects, the Government's free education and medical services to amputees as part of the reparations programme. The setting up of the Trust Fund was therefore not critical within this context.

### Challenges

On the part of Government, there is a clear political will to implement the TRC recommendations on war reparations but the challenges that need to be addressed include the following:

- ❖ Ownership of the Reparations Programme by the Government and people of Sierra Leone so that it is seen as a transitional justice issue to address peace consolidation and human rights within the state.
- ❖ Capacity building of a critical mass of NaCSA staff and Sierra Leoneans to manage Reparations which is a new phenomenon in the country, and the sub-region.
- ❖ Forging effective partnership with major stakeholders - Donors, International institutions and NGOs, Civil Society Groups, victims, Government Line Ministries- to create synergy.
- ❖ Creating awareness on the basic principles and guidelines on the right to restitution by the Government and people of Sierra Leone.
- ❖ Sensitisation on the scope of the Reparations programme

### Reparation as a sub-set of TRC Recommendations

- Who benefits - only those identified by the TRC or do we include others like families of missing persons, trauma victims, civil defense forces etc
- Cash vs other forms of reparation which address more fundamental human rights and reintegration issues (Restitution, symbolic

ceremonies, memorials, guarantees of non-repetition i.e reform of judicial and security system, good governance)

- Establishing a sustainable funding mechanism for the programme within the context of a weak economic base due to the destruction of the entire socio-economic infrastructure of the country
- Establishing a database to provide concrete information on genuine beneficiaries and reduce the possibility of abuse of the system.
- Review of government legislation, policies and programmes with a view to determining whether and to what extent reforms will be necessary to facilitate the implementation of the TRC recommendations on reparations.

In conclusion, the promotion of reintegration, reconciliation and peace in post war Sierra Leone is a huge challenge. Essentially, it revolves around giving all of our citizens a stake in society and a peaceful future, be they combatants, youths, displaced, disabled etc. However the peace building challenges can only be achieved through an integrated national strategy which promotes access to basic human rights such as food security, shelter, health, education, and other social services, as well as economic opportunities, justice and security. This takes time and resources but most of all, it will take a new spirit of transparency, equity, and inclusion between government and the people at national, regional, district, chiefdom and community level. NaCSA is proud to be making its own contribution to this challenge but is under no illusion as to the scale of the task ahead. However it is a task that we embrace and a task which must be achieved to ensure a peaceful future for our country.

As our delegation walks out of this conference this afternoon, we want to ensure that the right elements are identified and put together to add value to our reparation programme so as to yield the desired dividends. Clearly, this requires us to identify potential value adding factors to add to the equation to make the Sierra Leone reparations programme work!

We have engaged our drawing board for this exercise. A Task Force has been formed whose membership includes NaCSA as Chair, a member of the former TRC, the United Nation Integrated office for Sierra Leone (UNIOSIL), Civil Society and the victims. I want to conclude

by observing that the delegation from Sierra Leone has benefited immensely from the interventions of the very erudite speakers who have had considerable expertise on reparations and no doubt the best practices will inform our judgement in designing our reparations programme. I wish to assure you that we will respond positively to all offers of technical and financial assistance and will engage all stakeholders to make our programme work.

**Florence Ochola**, from Northern Uganda, spoke to the challenge of ensuring that reparations do not further stigmatise victims, particularly children.<sup>26</sup>

She noted that the war in Northern Uganda has dragged on for the last 20 years. Killings, massive displacement, abductions of innocent children and devastation of property and infrastructures have characterised it. Hundreds of thousands of people have been killed, many maimed permanently and others have suffered from mutilations of limbs, lips, noses, arms, ears, hands, legs and toes; at the hands of warring factions, especially the Lord's Resistance Army (LRA) rebels.

More than 25,000 children have been abducted since 1994 and children have suffered disproportionately through abductions, defilement, loss of their parents and being used as child soldiers and as sex slaves. Worst of all, children have suffered as killing machines against their own people in the community. The women have equally suffered from being subjected to acts of violence, human rights abuses, rape, losses of their dear ones (children and husbands) and homesteads. The women are now living with shame of stigma and dehumanisation due to losses of their human dignity in the IDP camps.

By mid 2002 there were approx. 522,000 persons living in internally displaced persons (IDP) camps and by 2003, more than 80% of the population of war-affected parts of Northern Uganda lived in over 200 camps. The total

number of people living in IDP camps then was estimated at over 1.5 million.<sup>27</sup>

The majority of the people, if not all, are traumatised, have too much worry and cannot sleep because of painful memories of what has happened to them individually and collectively. When one's children have been abducted, spouses killed, home destroyed, then one finds one self in a terrible dilemma. For example, one woman had one of her daughters abducted in 1996 by the LRA and has heard nothing about her ever since. Later another daughter of hers was burnt to death in an ambush on the road in 1998. Now a poor woman of sorrows, she cries all the time because of her losses. Another woman lost five of her children through abduction in a single day and was left with one child. The poor mother died of heart failure soon after; she could not bear the pain of her bereavement.



Florence Ochola

IDPs have limited access to land and few opportunities to generate income. Services have largely collapsed; there is virtually no civilian policing, inadequate water supplies and sanitation facilities, limited access to health care, massively over-congested primary schools and limited access to secondary education in the camp setting. Camps are over crowded with huts space close together. All the social problems that exist in other parts of Uganda are exacerbated by war.

<sup>26</sup> The full version of Ms. Ochola's presentation is available here: <http://www.redress.org/PeacePalace/StigmatizeVictimsFO.pdf>.

<sup>27</sup> Dolan, C (2005). *Understanding War and its Continuation: The case of Northern Uganda*. PhD. thesis. [Development Studies Institute](http://www.developmentstudiesinstitute.org.uk/), London, London School of Economics, London University.

As the rebels' activities intensified in the Acholi sub-region, many children fled into town centres for fear of abduction and death. These children trekked every evening from their homes to come and sleep in the Town centres. Some walked back and forth 12 kilometres from home to the town centres. These are the "Night Commuters."

Although exact numbers are unavailable, it has been estimated that more than 25,000 children have been abducted in Northern Uganda alone by the LRA since the beginning of the conflict.<sup>28</sup> It is also estimated that over 10,000 abducted children remain unaccounted for. The most recent data available indicates that 22% of males and 8.5% of female never returned.<sup>29</sup>

### Reparation dynamics in Uganda

In the Northern Ugandan context, in cases of child soldiers or formerly abducted persons reparation is geared towards healing of past wounds and building a future of hope, acceptance and self reliance. Ms. Ochola's view of reparation is that of acts and processes aimed at restoring, repairing or to keep in repair. It is the act and process of making amends, offering expiation, or giving satisfaction for a wrong or injury, or something done or given as amends or satisfaction.

According to the Ugandan Government, reparation is given as a way of resettling the former fighters and as an incentive for those still in the bush to come back home. The Government of Uganda and many donors view the Amnesty Act as a major incentive for combatants to leave the LRA. The task of the commission is to specifically issue amnesty cards and packages.

The challenges of the Amnesty Commission include limited resources, lack of trained personnel, transport and insecurity. Hence the Commission has not been able to provide much assistance to those who have so far received the amnesty cards. The slow pace of granting legal amnesty has been more than matched by the slow pace of disbursement of promised materials and financial support. Even those

equipped with packages find themselves resettled into devastating poverty. The 263,000/= Ugandan shillings they receive are often divided up in the family and do not support the formerly abducted persons as expected.

A further major limitation for the Amnesty Commission is its lack of a viable method of assessing those formerly abducted persons or child soldiers who fall outside the official systems. Though not a legal position, it has become a practice that the formerly abducted persons should first produce documentation of having passed through the reception centres. Yet there are those who came earlier prior to the inception of reception centres. There are also those who went quietly and settled bypassing the UPDF/CPU.

However, there is much confusion amongst potential beneficiaries about what Amnesty actually means. For some it means receiving a package; others believe they have been granted amnesty if they have gone through a reconciliation ceremony. Others have lost faith in the amnesty because they have been turned away. Moreover, the probability of receiving an amnesty package is so low that many just do not bother claiming it. They do not realise that not applying for amnesty could have adverse legal consequences.

Information on Amnesty is not fully received by the children and other low ranking formerly abducted persons while in the bush with the LRA.

All the formerly abducted persons felt that the packages of foodstuffs, commodities and money given to them on leaving the reception centres were helpful. But it turned out to be a cause of resentment to both the beneficiaries and their neighbours and families, especially among those who had not been 'abducted'. The children did not understand why the different centres and agencies provided different things. Camp officials also highlighted the incomprehensible inconsistencies. Children complained that community leaders do not seem to care for them in the face of such difference especially where fees were paid or not paid.

<sup>28</sup> UNICEF, "Northern Uganda Humanitarian Situation Report" (October 2005).

<sup>29</sup> J. Annan, C Blattman, R Horton, Survey of War affected youth (SWAY), April 2006.

Most of the formerly abducted persons who passed through centres complain of waiting to be called back to the centre to receive a package. Most of them have filled a form to receive training or tools, but never received anything. They have been told that, the future would be bright with an opportunity to go back to school and to be followed-up by the reception centre staff to see how they were coping at home. All these promises were never fulfilled. Those trained are never given tools to put skills learnt in the centre to work or being taught the wrong skills, effectively rendering the skills training as useless.

Within the displacement camps, cultural leaders and women have adapted rituals to welcome the returnee's home and in some cases, to help remove 'cen' (spirit) that is believed to lead to dangerous or abnormal behaviour. For the majority of returnees, this has had a therapeutic effect, especially if they had a good understanding of the rituals involved.

Young mothers and orphaned returnees are a particularly vulnerable category among returnees. Culture tends to discriminate against young returning girls and mothers. The breakdown of culture has left many orphans to face challenges on their own.<sup>30</sup>

### Challenges in achieving reparation efforts

Poverty, poor health care, and limited access to humanitarian assistance pose significant challenges to the ability of IDPs to realise livelihoods. Returnees identified food security as a major problem when returning home. Breaking out of these conditions is extremely difficult, as there are very few options available.

The condition of camp life is very sad. If you go to the camp, you look at the distances between the huts, where the latrines are located, no play areas for children and time and again, they have suffered from outbreaks of cholera, huts burning, and living on one meal a day from WFP rations. Then when groups of the LRA are given resettlement packages, the community asks,

*must you first kill, and commit all kind of atrocities to be rewarded or resettled?*

The stigmatisation comes as a result of any package given. For example clothes, blankets or mattresses become the source of stigmatisation because the community would not have any of the same. Worse still, the packages given are so inadequate that reparation becomes a burden when the child is looked at to shoulder all the responsibility in the family. Communities are always not prepared nor their capacities built to receive their children who may come back with limitations.

There are potential benefits associated with having a registered formerly abducted person in a household. Certain reception centres, notably Rachele, provide relatively generous packages for the families of abducted people, as well as paying fees for the formerly abducted person. This certainly caused some resentment from those who passed through other reception centres. Families without members who have been through centres have often been heard to complain, *"People are being rewarded for having been with the LRA."* Nonetheless there is an eagerness for some people to claim they have been abducted to attract additional assistance from the humanitarian agencies.

The blanket amnesty provides immunity regardless of the nature of atrocities committed and locks out the community. There is tension when LRA commanders receive 'rewards' and they end up back in the very community in which they committed the atrocities.

**Julián Guerrero**, Legal Counselor at the Colombian Embassy in The Hague, updated the audience on developments with Colombia's new law on justice and peace.

For the last 50 years Colombians have suffered from political violence from illegal armed groups both coming from the extreme left, mainly FARC and ELN, and from the extreme right self-defense groups or so-called paramilitaries. In the past different efforts were made to achieve peace, some successful, some not. In the early 90s agreements were reached with several guerrilla groups such as

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<sup>30</sup> ROCO WAT | Acholi, Restoring Relationship in Acholi-Land: traditional Approaches to Justice and Reintegration pg. 38.

the M-19, the ELP, and the Quintín Lame. All of its members were granted amnesties and victims' rights to truth, justice and reparation were not recognised. Today some of the former members of these groups are important members of Congress. Some make part of a large opposition party.

More recently between 1998 and 2002 the most ambitious effort to achieve peace with the largest guerrilla group, the FARC, took place, but unfortunately after almost 4 years of negotiations the peace process failed because of the lack of will of this guerrilla group.

However negotiations with the paramilitary groups that started in 2002 have succeeded and up until today 31,000 of its members have demobilised and have entered into a reintegration programme with the support and verification of the OAS. Among which are 57 of the top national leaders who are in jail awaiting investigations and trials based on the Law on Justice and Peace.

When the peace process started to advance the question was raised about what to do with those members of the paramilitary that had violated human rights and were responsible for serious crimes. Were they entitled to amnesties or should they be prosecuted according to ordinary criminal law. The dilemma was of course between justice and peace.

After analysing Colombia's international obligations and evaluating the best alternative, the Government presented the so-called Law on Justice and Peace which aimed at making a correct balance between these two values. Too much emphasis on justice would lack the "carrot" needed to convince the paramilitaries to continue in the peace process, too much peace would mean a lack of "stick" with the consequence of impunity and limited or no recognition of victims' rights.



Julián Guerrero

This law was debated for over two years in the media, in academia, both nationally and internationally and was subject to comments by international organisations, political parties, and NGOs. Everybody had something to say about the law. After much debate, the Colombian Congress passed the law with many modifications introduced throughout the discussions and after its approval it was reviewed by the Constitutional Court who found it to be constitutional, although it introduced significant modifications making it much stricter in its application and wider with regards to the rights of victims to truth, justice and reparation.

The law contains two main parts, the first refers to the judicial process and the conditions under which the members of illegal armed groups (either paramilitary or guerrilla) can benefit from an alternative punishment. That is among others to fully confess their crimes, depose their weapons, enter into a peace agreement, and stop their interference in public affairs, release the people they have kidnapped, contribute to finding the victims of forced disappearance, among others.

The second part of the law refers to the rights of the victims to truth, justice and reparation.

For the first time in Colombia's history victims came to the centre of attention as it was understood that they were the hinge between justice and peace. Beneficiaries will only be entitled to an alternative punishment if, and only if, they confessed all their crimes, were subject to a criminal procedure by independent prosecutors and judges and, most important of

all, if they 'repaired' the victims of their atrocities.

With regards to the right of victims to truth:

- The law establishes the obligation for members of illegal armed groups to fully confess all crimes in which they have participated as members of the group. Not only confess their personal crimes but those of the group as well. If crimes are hidden benefits will be lost and the ordinary criminal code will apply.
- There is a specific obligation to give the location of the victims of forced disappearance. Up until now more than 200 graves have been uncovered and the bodies returned to their relatives. There is information up until now of more than 2000 other victims of forced disappearance, a large number, especially taking into account that the confessions just started last December. There are insufficient means and it will take time.
- Confessions have also led to uncover the links between the paramilitaries and certain politicians and members of the army. The Supreme Court of Justice has issued arrest warrants against 9 Members of Parliament, which are already in jail. It will be for the Court to finally decide if they are responsible or not. Several members of the army are also currently under investigation, and these investigations have been transferred from the military justice system to the ordinary justice system.

With regards to the right of victims to justice:

- The law established a judicial procedure carried out not by a Truth and Reconciliation Commission or other quasi-judicial mechanism but by members of Colombia's judiciary. A group of 20 prosecutors (Medellín, Bogotá, Barranquilla) have been appointed and 8 judges (Bogotá and Barranquilla) have been selected to conduct the investigations and the trials. The fact that it is the ordinary judicial system that will be responsible for the investigations and trials has the additional benefit of helping to strengthen Colombia's judiciary.
- Victims have been recognised the right to participate in all the stages of the judicial process from the beginning and to request

reparations both material and moral, from the perpetrators.

- Two weeks ago (in February 2007) a Prosecutor heard a group of 165 victims.
- There are templates where victims can describe the crimes that have been committed against them and ask for reparations.
- In order to effectively exercise their rights they can be assisted by a public attorney.
- The equivalent to an Ombudsman will also participate in all judicial proceedings in order to guarantee the rights of the victims and the protection of the assets for reparation. (12 *procuradores delegados* have been appointed)
- There has been a discussion about the publicity of the public hearings. Not that victims cannot participate, but if these should be transmitted by television. It seemed a good idea but could also have negative effects. In any case they have been authorised and will commence in the near future.
- The right of the victims to justice also entails an effective punishment of 5-8 years of jail, that should be served in ordinary prison conditions and not in less harsh detention sites as it was initially foreseen.

With regards to victims' rights to reparation, victims are entitled both to material and to moral reparations:

*Restitution.* Especially important for returning land that has been taken away illegally:

- 22 houses in Medellín have already been given voluntarily to victims
- Property titles for 22 families that were victims of two massacres (Honduras and La Negra) committed in 1989 were also given.
- One curious example of the things that you find is the case of areas of national parks that had been privatised, and now when the question of restitution is raised, there comes the question: to who should it be restituted? To the victims, but how to do so if this land belongs to the State. It could only be restituted to the State.

The law also provides for compensation and rehabilitation, both physical and psychological as well as satisfaction (which focuses mainly on moral reparations) and measures of non-recurrence.

The OAS is assisting Colombia with a permanent mission of support to the peace process. The reintegration programme has recently been given a higher status by appointing a presidential advisor of ministerial level to coordinate the programme.

The challenges in this field are immense and will require the cooperation of the international community. The Netherlands for example is partially supporting these efforts. Another example is the decision by the CNRR to melt the more than 17.000 arms that have been handed in as a guarantee of non repetition in favour of the victims.

But the question is who and with what will victims be repaired. In the first place reparation must come from the actual perpetrator who must respond both with their illegal and legal assets. They must respond with all their patrimony; they must hand all their illegal assets - if not they will lose their benefits.

However, perpetrators must not only respond for the damages they have caused themselves. The law establishes an obligation of solidarity among the member of a specific group. That means that all the members of a specific group must respond for the damages of all the other members.

Finally, in case the perpetrators cannot respond, the State has the obligation to fully repair the individual victims. The Court has said that no budgetary constraint may be used as an argument to excuse the state from repairing the victims.

All this refers only to individual reparations granted by a judicial decision, but the law also establishes the right of victims to collective reparations, and for that reason it has created a Commission for Reparation and Reconciliation.

The Commission for Reparation and Reconciliation is not exactly a truth and reconciliation commission, as this transition process is taking place not at the end of the conflict but in the middle of it, when still other illegal armed groups continue to act. But it should serve as the basis for a future TRC. It

has a mixed composition, including not only members from the Government and State control organs, but also by representatives from civil society and victim representatives. Gender considerations have also been taken into account. Well recognised members of civil society have been appointed to the Commission.

Although the Commission is still in its initial phase of work, they have issued a document on strategy which includes the definition of victims: *“Any person of group of persons, that with the occasion or because of the internal armed conflict, since 1964, has suffered any individual or collective damage by acts or omissions that violate the rights established in the Constitution, in International Law of Human Rights, in International Humanitarian Law and International Criminal Law, and that is considered a crime in Colombian legislation”*.

The definition of reparations has been identified as: *“Reparation consists in dignifying the victims by measures that will alleviate their suffering, compensate their social, moral and material losses, retribute their rights”*.

The strategy document also includes physical and moral harm and allows for individual or collective reparation. Equally, it makes reference to the international human rights instruments, including the ICC (The Colombian Criminal Code has incorporated the crimes of the Rome Statute). It also creates two separate programmes: the Institutional Reparations Programme (short term programme for collective reparations such as indigenous groups, peasant communities, etc) and the National Reparations Programme (medium term programme with a gradual implementation depending on the gravity of the crime, the profile of the beneficiaries, etc. Something that will take 10-15 years).

The Commission also has the role of recommending the criteria for judicial reparations. They have already pointed out that any reparation measure must be developed in consultation with the beneficiary of the measures among other things, and given some other guidelines. These and other documents prepared by the Commission have been the subject of consultations with social organisations and in order not to repeat the



mistakes of other countries, the Commission is receiving assistance from the International Organisation for Migration (IOM), and specifically from two lawyers: one that has handled the Iraqi claims fund and the other the German fund for non-Jewish victims from the Nazi Holocaust.

One of the most difficult challenges when it comes to the issue of reparation is the capacity of the State to seize the assets of the perpetrators. For this reason the Law on Justice and Peace created a parallel organ: The Regional Commissions for the Restitution of Assets. These regional commissions do not directly restitute property but are responsible for identifying the legitimate owner of land or goods, and their title deeds, and to protect that property for future restitution. This work has just started and small voluntary restitutions have taken place.

Finally Mr. Guerrero referred to the way in which the money and the assets for material reparations will be handled. The Law establishes a Fund for the Reparation of Victims. The Fund will be in charge of paying judicially ordered reparations as well as those ordered by administration programmes.

It is difficult to establish which property will be used to repair and which to restitute. It could happen that a judge will order that an illegal asset be sold in order to pay for reparations but in the future victims could claim it for restitution

The challenges Colombia is facing at the moment in relation to victims reparations are immense. Let us hope that this new law is successful in its implementation and contributes to bringing peace and reconciliation to our country.

## Questions and Discussion - Afternoon Sessions

The Question and Discussion session was chaired by **Carla Ferstman**, Director of REDRESS.

**Florence Ochola** noted that one of the issues that one picks up with victims groups is the

question of the future, victims live in a day to day survival mode and so to think beyond that period of how to plan for the future is very difficult. Often this is an important issue for reparations programmes.

On the issues of expectations, when you pay school fees for a child for one year they will expect that this will continue throughout their education. The challenges are to sustain the reparations, to fully involve the community to decide what it is that they really want. When the victims have been used or participated in the direct killing of the people that they are supposed to come back and stay with there is a large dilemma.

Reparations without government support will not work, this is because other states or donors do not commit for the long term; it will not last forever. The local community organisations also need to be brought into the exercise. If a project fails it can also become another source of hostility.



Clemens Nathan

**Shari Reig** indicated that on the issue of approving only those who are eligible, documentation is crucial. What they focused on was the need to show some evidence to prove that you were for example a slave labourer. Often this meant your name being on some list, for example a transport list, a role call at a camp. They did however succeed in cutting out the need to prove something beyond that. So some evidence was needed. It was rare for the system to be abused. However, they did not want to cheapen the process by making it available to everyone.

With looted assets, because it was well known that this was a major policy of the Holocaust they could infer that this happened. The problem was determining where the assets went.

**Syl Fannah** noted, in respect of the role of the Government in supporting reparations programmes, that in Sierra Leone there is a clear political to appease people who have gone through this trauma. The fundamental problem is that this Government has a strong history of collapsing and it is there with very little money. The national budget is almost 90% donor driven, and the donors also earmark what they want their money spent on.

**Yasmin Sooka** noted that one of the interesting things about the South African amnesty was that it never suspended the criminal justice process, and in fact while the Commission's amnesty committee was doing its work there were significant trials taking place. The problem with them was, one of the trials involved the former minister for defence and the judge was an old order judge and the case fell. Another involved an old chemical and biological warfare expert and the judge was again of the old order and the case also failed. This created quite a lot of despondency in the country but when the TRC completed its work they handed a list of more than 3000 names to the prosecutorial authority for some kind of screening. The TRC wanted them to particularly deal with the people at the top, most of whom did not apply for an amnesty. When in 2005 the prosecution guidelines contained an amnesty, we protested and it was withdrawn for a year.

On the question regarding Government mainstreaming, Ms. Sooka indicated that she thought the Commission was careful not to create a programme of reparations that the Government would not be able to manage. It tried to network it into existing developmental programmes. An important issue is when will the Government be responsible?; it is many years since 2004, and that is the real challenge. One interesting feature of the Liberian system is that the President would not announce the establishment of the Commission until she could find the initial money, about \$100,000. This was so the Liberian Government would have some ownership in the programme which has been a problem in Sierra Leone. We try and argue for a move away from complete dependency on donors. An important question is what has happened to the money from the diamonds, which was meant to go towards helping the war victims.

**Clemens Nathan** noted that psychology is one side of the equation, the other side is that, in his experience with Holocaust survivors over 40 years, many of them have been extremely successful in life by building, creating and developing. If they spend too much time looking back or inwardly at themselves they can collapse. Survivors were very happy when they were keeping busy with what ever they were doing, but when they retired many collapsed because suddenly their motivation disappeared. He indicated that he is terrified by some psychological experiments to reopen these wounds. People can achieve so much with the power of motivation.



Sidi Bah

**Vahida Nainar** queried in respect of the Sierra Leonean TRC what the status was with the recommendation to establish a war victims fund. She also noted with regard to reparations to perpetrator victims, governments have often found the resources to provide reparations or compensation to the armed forces, while at the same time the victim community have got nothing. The issue is one of priority.

**Florence Ochola** noted on the issue of children being reintegrated better with other children, on the ground the parents have the will but they often do not have the means, that before the conflict, when the family was living together they had a relatively sufficient home, now the parents live in a single room with the rest of the family. Some children have developed a fear that they cannot go back to their former communities. These factors have caused children to live on their own and has led to child headed households.

**Syl Fannah** commented on the issue of the diamonds, in general they probably have caused more problems over the years than they were worth. Only a small amount of money since the end of the war has found its way from the mining corporations to the Government. On the war victims fund, the President has made an allocation of \$100,000 to begin the process. The issues that need to be sorted out are how to establish the legal and operational frameworks, and to build the capacity.

## CLOSING SESSION

The closing session was led by **Clemens Nathan** and **Alan Stephens** of the Clemens Nathan Research Centre and **Carla Ferstman** of REDRESS.

**Carla Ferstman** summarised some of the main themes that had come up in the course of the Conference:

1. The relationship between the broad theoretical framework, with the laws and procedural rules, and then how this relates to the practice - One often thinks of this as a single trajectory starting with the broad framework and then leading to the

procedural framework and then ending with the practical implementation. However, what has come to light over the course of the two days is that one cannot only see it in one direction. One needs to take particular account of how things will be practically implemented at the end in order to set up the basic framework. It is a multi-directional system.

2. Throughout the two days everyone has discussed challenges and problems, such as lack of implementation when it comes to achieving reparation. There are a variety of reasons for this lack of implementation. However, also considered in the discussions were the factors that contributed to successful implementation, and it is here, by examining these factors, that we can start to solve the problems. Every organisation, every court has bureaucracies which can put barriers in front of solutions. It is only in those cases when the institutions themselves decided to work through the bureaucracy to find a solution that solutions were found. For instance with regard to the evidence issues, clearly the organisations that took it upon themselves to work out the evidentiary limitations contributed to solving the problem. With regard to the issue of assets, we have to remember that we will only recover assets if a very proactive approach is taken and very detailed information is provided to ensure that assets can be arrived at in practice.

3. There is no such thing as full reparations and we have to concede this, but this fact should not act as a deterrent; we must remain vigilant in working to exercise reparations in as full a way as possible despite the challenges.

In this respect, I close with an anecdote from Mr Saul Kagan. I asked him how it was that the Claims Conference actually got the negotiations running. He replied that:

*They did not exactly let us in the front door. But, we looked for the side door, but they did not let us in there either, so we looked to see if there was an open window, but they were all locked. So we pretended that we were Santa Claus and came down*

*the chimney. This epitomises what is necessary for reparations to be realised in practice. We must find ways around the barriers.*

**Clemens Nathan** and **Alan Stephens**

thanked all the speakers and participants for coming from so far and contributing so much to the proceedings. They reaffirmed the need to find synergies between systems that have had some success and new programmes and systems in the making. It is important that best practice and lessons learned are used to advantage.

They also thanked the Carnegie Foundation of The Hague for its support and indicated their hope that this Conference would be the start of a series of conferences on related themes: the *Hague Dialogues*.