

REDRESS

Ending Torture. Seeking Justice for Survivors

**Articulating Minimum Standards
on Reparations Programmes
in Response to Mass Violations**

**Submission to the Special Rapporteur on the Promotion of Truth, Justice,
Reparation and Guarantees of Non-Recurrence**

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SUMMARY

1. International human rights law recognises that victims of gross violations of human rights and serious violations of international humanitarian law have the right to an effective remedy, including reparation. There is international consensus that such remedies and reparation must meet certain minimum legal standards, regardless of whether violations were committed as isolated instances, or on a massive scale. However, those standards are not always reflected in the political negotiations on the establishment of administrative reparations programmes. It is time that the existing legal standards are specifically and authoritatively articulated in relation to administrative reparations programmes. Such standards are important for domestic policy makers, victims' groups, and the international community involved in advocating for and supporting such programmes, and are crucial to ensure that victims' rights are reflected in reality.

I. INTRODUCTION

2. The provision of reparation is one way to address the terrible consequences for victims of international crimes and gross human rights violations. Mass atrocities cause large scale suffering inflicted on individual human persons, collectivities and entire populations. More often than not victims of mass atrocities are ignored. Many governments do not have a genuine interest in the fate of victims; there is great reluctance to face and acknowledge cruelties that occurred and there is a prevailing sense both that harm is irreparable and that the scale of the task is too large, and unaffordable.
3. However, specific state obligations to afford victims an effective remedy and reparation to redress violations have been recognised under general international law, human rights law and international humanitarian law, including the Hague Conventions on the Laws and Customs of Land Warfare of 1907¹ and its Additional Protocol I,² the International Covenant on Civil and Political Rights³ and the UN Convention Against Torture.⁴ International jurisprudence and a number of international declarative instruments have underlined that these obligations continue to apply in situations of mass violations.⁵
4. The rights and duties recognised in these standards are distilled in the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the "UN Basic Principles"), which serve as a key reference point for the determination of duties of states in international, regional and domestic systems in situations of mass violations. The UN Basic Principles are explicitly stated to "not entail new international or domestic legal obligations", but rather to reflect existing obligations under international human rights law and international humanitarian law.⁶
5. In addition to official instruments, civil society initiatives also aim to promote victims' rights. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, for

¹ Article 3 of The Hague Conventions on the Laws and Customs of Land Warfare of 1907.

² Article 91 of the Additional Protocol I to the Geneva Conventions.

³ Article 2 of the International Covenant on Civil and Political Rights.

⁴ Article 14 of the UN Convention Against Torture.

⁵ See e.g. *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), and the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) (the "UN Basic Principles"). The UN Basic principles speak of: (i) 'equal and effective access to justice', 'reparation for harm suffered', and access to relevant information' (Article 11).

⁶ UN Basic Principles, Preamble.

instance, provides for gender specific considerations regarding the formulation and implementation of reparations programmes and underlines additional aspects that are important in the process of awarding reparations.⁷ Other recent documents include the International Law Association’s Declaration of International Law Principles on Reparation for Victims of Armed Conflict (2010),⁸ and Procedural Principles for Reparation Mechanisms (2014).⁹

II. OVERARCHING STANDARDS ON REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

6. The sources outlined above provide important overarching standards specifically related to reparation for victims of gross violations of human rights and serious violations of international humanitarian law.¹⁰ These standards apply to serious violations that occur in isolation, and to violations carried out on a massive scale alike.

(i) The nature of reparation to be provided

7. The UN Basic Principles recognise that reparation for gross violations of human rights and serious violations of international humanitarian law:

- Must be **adequate, effective and prompt** (para. 11(b));
- Should be **proportional to the gravity of the violations and the harm suffered** (para. 15);
- Must be **provided by the State** for acts or omissions that can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law (para. 15); and
- Should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be “**full and effective**”, and include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (para. 18).

8. The UN Basic Principles set out in greater detail what should be covered within each form of reparation. For compensation, in particular, it is recognised that it “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”, including moral damage (para. 20).

⁷ Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, 21 March 2007 (“Nairobi Declaration”), available at:

<http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>

. See also the African Commission’s Resolution 111 on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, adopted in Brazzaville, Republic of Congo, 28 November 2007.

⁸ International Law Association, Declaration of International Law Principles for Victims of Armed Conflict, adopted at the 74th ILA Conference (The Hague, Resolution 2/2010) (“**ILA Reparation Principles**”), available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

⁹ International Law Association, Declaration of Procedural Principles for Reparation Mechanisms, adopted at the 76th ILA Conference (Washington, Resolution 1/2014) (“**ILA Procedural Principles**”), available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

¹⁰ Note that the concept of “victim” is defined in the UN Basic Principles and includes “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 international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” (para. 8).

(ii) The process by which reparation is decided and delivered

9. The UN Basic Principles also provide general overarching standards about the processes through which reparation can be provided. Importantly, the UN Basic Principles recognise that victims have the *right* of equal access to an effective *judicial* remedy.¹¹ Where reparation is claimed through judicial processes, states must enforce domestic judgments for reparation.¹²
10. However, delivering adequate and effective reparation for mass violations through judicial processes poses a particular challenge, taking into account that most societies coming out of a period of mass violations, even with the best of will, will have weak legal infrastructures, competing demands for scarce resources and a vast number of victims with a range of rights and needs. Courts in domestic legal systems are also often barred from making awards against the state, or are limited to making awards of compensation only. In such circumstances, administrative mechanisms are often the most realistic way to deliver prompt, adequate and effective reparation to victims of mass violations.¹³
11. The UN Basic Principles accordingly recognise that reparation may be delivered through other mechanisms, including administrative programmes.
12. For either type of process, the UN Basic Principles recognise that States should:
 - Disseminate information about available remedies (para. 12(a));
 - Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses (para. 12(b)); and
 - Provide proper assistance to victims seeking access to justice (para. 12(c)).
13. In addition, the UN Basic Principles stress the principle of non-discrimination, setting out clearly that the principles must be applied and interpreted without any discrimination of any kind or on any ground, without exception.¹⁴

III. THE DELIVERY OF REPARATION THROUGH JUDICIAL MECHANISMS

14. Although the numbers are still relatively small, international, regional and domestic courts have been presented with a number of cases concerning claims for reparation for individual victims or groups of victims of mass violations. Through such cases, these bodies have begun to develop more detailed legal standards on how “adequate” and “effective” reparation is identified and provided to victims of mass violations on an individualised and group basis.
15. This submission will not look at the jurisprudence that has been developed by these bodies in detail: suffice to say that courts including the International Court of Justice,¹⁵ the Inter-

¹¹ UN Basic Principles, para. 12 (“A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law”).

¹² UN Basic Principles, para. 17.

¹³ See Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo, 23 April 2010, UN Doc. A/HRC/14/22 (“**SR VAW Report**”), pp. 35ff. See further REDRESS (2014), ‘Participation in Transitional Justice Processes by survivors of Sexual And Gender-Based Violence: Submission to the Office of the High Commissioner for Human Rights’, March 2014, pp. 3-4, available at: <http://www.redress.org/downloads/publications/REDRESS%20Submission%2018%20March%202014.pdf>.

¹⁴ UN Basic Principles, para. 25.

¹⁵ See, eg. International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) Advisory Opinion of 9 July 2004; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) Judgment of 19 December 2005. See also (concerning an isolated violation) *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (2007) Judgment of 24 May 2007.

American Court of Human Rights¹⁶ and – increasingly – the European Court of Human Rights,¹⁷ have dealt with a large number of individual cases and group claims from periods of mass violations, and have developed rich jurisprudence on the provision of reparation where violations are found. The International Criminal Court has also recently developed principles on reparation prior to its first reparations decision in the *Lubanga* case.¹⁸ Other sub-regional courts, including the ECOWAS Court,¹⁹ and quasi-judicial bodies such as the African Commission on Human and Peoples’ Rights²⁰ and UN treaty bodies,²¹ have also addressed cases of individual or group claims arising from mass violations. National courts – both in countries where violations have taken place, and in third countries – have also delivered judgments awarding reparation to victims of mass violations in accordance with their own laws.²²

16. In each case, as judicial mechanisms, courts are guided by legal standards drawn from their constitutive instrument and/or domestic laws, from international obligations, and developed through their own jurisprudence. This is contributing to a growing body of jurisprudence on reparation, with signs of increasing convergence, including regular reference to the UN Basic Principles.²³

IV. THE NEED FOR STANDARDS ON PROVISION OF REPARATIONS TO VICTIMS OF MASS VIOLATIONS THROUGH ADMINISTRATIVE MECHANISMS

17. On the other hand, the provision of reparations through administrative mechanisms has appeared to be guided less by specific minimum standards articulated in respect of such programmes. Although the overarching principles outlined above are accepted standards, it is not articulated as clearly how to judge whether reparations delivered through such programmes would satisfy the requirement of “adequate” and “effective” reparation, and whether the process through which such programmes are designed and implemented respect victims’ procedural and related rights.
18. As such, while it is clear that States have a legal obligation to provide reparation to victims for violations for which they are responsible, and that there are legal standards that such

¹⁶ See, eg. *Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs), IACtHR, Judgment of 11 May 2007, Series C, No. 163; *Rochela Massacre v Colombia*, (Merits, Reparations and Costs), IACtHR, Judgment of 31 January 2006, Series C, No. 140; *Plan de Sanchez Massacre v Guatemala*, Judgment (Reparations) IACtHR, Judgment of 19 November 2004, Series C, No. 116; *Garcia Lucero v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 28 August 2013, Series C, No. 267.

¹⁷ See, eg. *Aslakhanova and Others v. Russia* (2012), Apps. Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012; *Cyprus v. Turkey* (2014) App. No. 25781/94, 12 May 2014.

¹⁸ Decision establishing the principles and procedures to be applied to reparations, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 7 August 2012 (“**ICC Reparation Principles**”). At the time of writing, this decision was under appeal.

¹⁹ See eg. ECOWAS Community Court of Justice, *SERAP v Nigeria*, ECW/CCJ/APP/08/09, Judgment No ECW/CC/JUD/18/12, 14 December 2012.

²⁰ See, eg. African Commission, *Institute for Human Rights and Development in Africa (on behalf of Emaila Connateh & 13 others) v Angola*, Communication 292/04; *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean Refugees in Guinea) v Guinea*, Communication, Communication 249/02; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication 245/02; *The Social and Economic Rights Action Center and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96; *Malawi African Association et al. v Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98.

²¹ See, eg. *Giri v Nepal*, Comm. No. 1863/2009, Views of 19 July 2012; *Mihoubi v. Algeria*, Comm. No. 1874/2009, Views of 18 October 2003.

²² See, eg. USA: *Jean v Dorélien*, 431 F.3d 776, 779-780 (2005); *Jane Doe I, Jane Doe II, Jane Doe III v. Emmanuel Constant, a/k/a Toto Constant*, Case No. 08-4827-cv, Court of Appeals for the Second Circuit, United States; Netherlands: Hague Court of Appeal, 7 July 2011, *The Netherlands v Mpambara*, (2011), 22-002613-09; France: Cour d’assises de Nîmes, 1 juillet 2005, No 71/05, reprinted in *Groupe d’action judiciaire de la FIDH, Mauritanie: Affaire Ely Ould Dah*, Annex 4, novembre 2005 at 55.

²³ For example, see the ICC Reparation Principles, above n.18, para. 185.

reparation must meet, the provision of reparations through large administrative programmes is often framed as a political negotiation in relation to scarce resources, rather than something that should comply with overarching legal standards.

19. There has been some oversight of such programmes by courts and treaty bodies, although this has been limited. In a number of cases these bodies have found such programmes contrary to victims' rights – for example because they have excluded certain types of victims,²⁴ have provided “austere and symbolic” or “derisory”²⁵ compensation only,²⁶ have required victims to declare disappeared relatives as dead,²⁷ or have linked the provision of reparations to amnesties for gross violations of human rights.²⁸
20. The creation of a reparations programme in response to mass violations inevitably entails political or policy elements, but it must still meet minimum legal standards to uphold victims' rights, and should not be a process in which others can bargain such rights away. Policy makers, victims' groups, diplomats, funders, and international organisations would benefit greatly from more specific guidance on how those minimum standards apply.
21. The past ten years has seen a growing number of efforts by both United Nations bodies and civil society organisations to articulate a range of minimum standards on reparations programmes tailored to a transitional justice context. These include the work of Professor Diane Orentlicher, in her study on best practices in preparation for the Updated Impunity Principles (2004),²⁹ the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (“Updated Impunity Principles”) (2005);³⁰ the report of the Special Rapporteur on Violence Against Women on Reparation (2010),³¹ the General Comment issued by the Committee Against Torture (“CAT”) on Article 14 of the Convention Against Torture (the right to redress) (2012);³² the General Recommendation from the Committee on the Elimination of Discrimination Against Women (“CEDAW”) on women in conflict prevention, conflict and post-conflict situations (2013),³³ the OHCHR's Rule of Law Tools for Post-Conflict States: Reparation Programmes (2008),³⁴ the Guidance note of the Secretary General on Reparations for Conflict-Related Sexual Violence (“UNSG Guidance Note”) (2014),³⁵ the OHCHR's analytical study presented to the UN General Assembly

²⁴ Such as exiles: see, eg. *Garcia Lucero v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 28 August 2013, Series C, No. 267.

²⁵ Committee Against Torture (“CAT”), Concluding Observations: Peru, CAT/C/PER/CO/4 (2006), §22.

²⁶ CAT, Concluding Observations: Chile, CAT/C/CR/32/5 (2004), §6(g)(v).

²⁷ See, eg. HRC, *Mihoubi v. Algeria*, Comm. No. 1874/2009, Views of 18 October 2003.

²⁸ See, eg. Supreme Court of Nepal, judgment of 2 January 2014 on Nepal's TRC Ordinance. See further, Republica, ‘SC rejects TRC ordinance over blanket amnesty’, 3 January 2014, available at: http://www.myrepublica.com/portal/index.php?action=news_details&news_id=67287.

²⁹ ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, by Diane Orentlicher’ (2004) UN Doc. E/CN.4/2004/88, 27 February 2004 (“**Independent Study on Best Practices**”).

³⁰ ‘Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity’ (2005), UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (“**Updated Impunity Principles**”). See also the ‘Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher’, UN Doc. E/CN.4/2005/102, 18 February 2005 (“**Impunity Principles Report**”).

³¹ SR VAW Report, above n.13.

³² CAT, ‘General Comment No. 3: Implementation of Article 14 by States Parties’, UN Doc. CAT/C/GC/3, 13 December 2012, paras. 20 and 32.

³³ CEDAW, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’, UN Doc. CEDAW/C/GC/30, 18 October 2013, paras. 74-80.

³⁴ OHCHR, ‘Rule of Law Tools for Post-Conflict States: Reparation Programmes’ (2008), HR/PUB/08/1, available at: www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

³⁵ ‘Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence’, June 2014 (“**UNSG Guidance Note**”), available at:

<http://www.unwomen.org/~media/Headquarters/Attachments/Sections/News/Stories/FINAL%20Guidance%20Note%20Reparations%20for%20CRSV%203-June-2014%20pdf.pdf>.

focusing on gender-based and sexual violence in relation to transitional justice (2014),³⁶ the civil-society drafted Nairobi Declaration³⁷ and the ILA Procedural Principles (2014).³⁸

22. Building on this work, now is a crucial moment to authoritatively articulate how minimum standards to uphold victims' rights apply to the creation and implementation of administrative reparations programmes in response to mass violations. These should be grounded in the general legal standards expressed in the UN Basic Principles, the reality facing societies in transition, and the experience of victims in a range of transitional justice contexts.
23. Any elaboration of such standards should address, at a minimum, the following:

(i) Recognition of victims as rights holders & responsibilities of States

24. To have symbolic and legal meaning, the provision of reparations to victims must be tied to explicitly recognising the victims as rights holders: both recognising that their rights have been violated, and their "status as citizens and bearers of equal human rights".³⁹ The process of developing and implementing a reparations programme should therefore explicitly recognise that reparation is victims' right, and that victims have *the* key stake in the process of designing and implementing the programme.⁴⁰
25. In **Peru**, for example, the Truth and Reconciliation Commission explicitly acknowledged that reparations were a "moral, political and legal obligation of the State and that recognition of victims as human beings whose fundamental rights were violated is "the central goal" of reparations".⁴¹ In **Timor-Leste**, the draft legislation to establish a reparations programme (which has still not been passed) recognises in its first preambular paragraph that victims' right to reparation is grounded in international law and enshrined in the Constitution of Timor-Leste.⁴²
26. In **Kenya**, the Truth, Justice and Reconciliation Commission has underscored "the importance of victims' involvement in the implementation of reparation measures and the need for victim empowerment to this end".⁴³ It also recognises that it is "the State of Kenya which is responsible for reparations for violations covered under the mandate of the Commission, either because violations were perpetrated by State agents or the State failed to protect its citizens".⁴⁴
27. For this reason it is also, as this Special Rapporteur and the Special Rapporteur on Violence Against Women have recognised, important to draw a distinction between reparations and

³⁶ 'Analytical study focusing on gender-based and sexual violence in relation to transitional justice: Report of the Office of the United Nations High Commissioner for Human Rights', UN Doc. A/HRC/27/21, 30 June 2014.

³⁷ Above, n.7.

³⁸ Above, n. 9.

³⁹ Impunity Principles Report, above n.30, para. 59(e). See also 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff', UN Doc. A/HRC/21/46, 9 August 2012, para. 29 and Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', UN Doc. A/68/345, 23 August 2013 ("Transitional Justice and Development Report"), para. 37-38.

⁴⁰ Independent Study on Best Practices, above n.29, para. 59.

⁴¹ *Ibid.* See further, Truth and Reconciliation Commission of Peru, 'Summary of the Comprehensive Reparations Plan (PIR)', English translation available at:

http://www.aprodeh.org.pe/sem_verdad/informe_final/english/reparations_plan.pdf, para. 2.2.2.1.

⁴² See Timor-Leste Draft Law no. ° 19/11 National Reparations Framework, available at:

<http://www.laohamutuk.org/Justice/Reparations/ReparMay2010En.pdf>.

⁴³ See Report of the Truth, Justice and Reconciliation Commission Kenya, 2013, Volume IV, p.102.

⁴⁴ *Ibid.*, p.98.

other measures of development, humanitarian relief and social assistance.⁴⁵ This Special Rapporteur has described:

the tendency on the part of many Governments to pass development programmes as transitional justice programme, a tendency that takes both mild and extreme forms; the latter consists in the assertion that justice can be reduced to development, that violations do not really call for justice but for development. The milder form consists in pretending that development programmes are reparation programmes. Both forms of the tendency constitute a failure to satisfy abiding obligations that include both justice and development initiatives.⁴⁶

28. This is, as the Special Rapporteur has observed, a position adopted by a number of states: “it can be observed in countries in all geographical areas and that defy any easy categorization in terms of cultural, religious, legal and historical background, or in terms of developmental stage”.⁴⁷ As the Special Rapporteur points out, however, “[t]he diversity of Governments tempted by this position obviously does not make it correct”.⁴⁸ On the other hand, ensuring that victims of mass violations, often coming from the most marginalised sectors of society, can benefit in full equality and without discrimination from development must be an important aspect for development policy, though it cannot be seen to be equated with adequate and effective reparation measures.
29. Finally, while support from other states and international organisations may be important in the development and implementation of reparations programmes, this assistance cannot replace the central role of the responsible state. As is set out in the Basic Principles, reparation must be provided by the State for acts or omissions which can be attributed it.⁴⁹ This includes acts carried out by previous governments. In addition, “States should endeavour to establish national programmes for reparation and other assistance to victims in the event that any other parties liable for the harm suffered are unable or unwilling to meet their obligations”.⁵⁰ This is reflected in the UNSG Guidance Note, which provides that, while “[d]evelopment cooperation should support States’ obligation to ensure access to reparations”.⁵¹
- [i]nternational cooperation and assistance, including from the UN, should not be a substitute for the role that States must play in reparations. States should acknowledge their responsibility for violations of international human rights law and international humanitarian law and use their financial and institutional capacity in a diligent way to repair the harm suffered by victims.⁵²
30. The UNSG Guidance Note gives examples of situations in which international cooperation has supported the design and implementation of reparations, while retaining a central role for the state concerned. For example, in **Sierra Leone**, reparations for survivors of sexual violence were supported by UN peacebuilding funds, with staff salaries and overheads provided by national authorities.⁵³

⁴⁵ Transitional Justice and Development Report, above n. 39, paras. 11, 51, 59, 70; SR VAW Report, above n.13, paras. 19-20. See also UNSG Guidance Note, above n. 35, pp. 9-10; Nairobi Declaration, above n.7, Principle 3(B).

⁴⁶ Transitional Justice and Development Report, above n. 39, para. 59.

⁴⁷ *Ibid.*, para. 11.

⁴⁸ *Ibid.*

⁴⁹ UN Basic Principles, para. 15.

⁵⁰ *Ibid.*, para. 16.

⁵¹ UNSG Guidance Note, above n. 35, Operational Principle 5.

⁵² *Ibid.*, p. 10.

⁵³ *Ibid.*

(ii) Victims have the right of equal access to remedies, including those delivering reparations, and must not be subject to discrimination

31. An additional overarching principle, impacting on many of the points elaborated in the following sections, is that victims have the right of equal access to remedies, and must not be subject to discrimination.⁵⁴ As expressed in the Nairobi Declaration:

All policies and measures relating to reparation must explicitly be based on the principle of non-discrimination on the basis of sex, gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability and affirmative measures to redress inequalities.⁵⁵

32. This will require the taking of positive steps to enable the participation of groups who have traditionally been discriminated against or marginalised in the design of reparations programmes, and to access those mechanisms once they are established.⁵⁶ It will require adequate procedural rules to ensure the dignity and privacy of victims.⁵⁷ In addition, as recognised in the UNSG Guidance Note: “[d]ecisions on and the delivery of reparations should similarly not reinforce pre-existing patterns of ... discrimination, but rather strive to transform them”.⁵⁸

33. Equal treatment does not mean, however, that all victims must receive the same reparations;⁵⁹ indeed it is important to recognise that different types of victims will experience harms in different ways,⁶⁰ and to reflect the gravity of the harm in the nature and extent of the reparations provided.⁶¹ In addition, particularly vulnerable victims may be prioritised in terms of the sequencing of processing claims and providing reparations: this has been done or recommended, for example in **Peru, Sierra Leone, Guatemala, Rwanda, Liberia and East Timor**.⁶²

(iii) Reparations programmes should be comprehensive in scope

34. Following on from point (ii), many administrative reparations programmes have suffered from under-inclusion of the rights violations covered, and therefore beneficiaries – often excluding from their scope “those who have traditionally been marginalised, including women and some minority groups”.⁶³

35. More recently greater attention has been paid to including victims of sexual violence in reparations programmes, but other types of gender-based violence such as “forms of reproductive violence (including forced abortions, sterilization or impregnations), domestic enslavement, forced ‘marital’ unions, forced displacement, abduction and forced recruitment” have not tended to be covered.⁶⁴

36. Other programmes have deliberately excluded certain “types” of victims, including, for example “members of subversive organisations” and those charged with terrorism or

⁵⁴ UN Basic Principles, para. 25. See further ILA Procedural Principles, above n. 9, Principle 3.

⁵⁵ Nairobi Declaration, above n.7, Principle 1(B).

⁵⁶ See further points (iv) and (v) below.

⁵⁷ See eg. UNSG Guidance Note, above n. 35, Operational Principle 8.

⁵⁸ *Ibid.*, p. 5.

⁵⁹ Impunity Principles Report, above n.30, para. 59(a).

⁶⁰ SR VAW Report, above n.13, para. 45.

⁶¹ See further below, point (vi).

⁶² See further Capone et al., ‘Education and the Law of Reparations in Insecurity and Armed Conflict’, September 2013, pp. 104-108.

⁶³ Impunity Principles Report, above n.30, para. 59(a), SR VAW Report, above n.13, paras. 43-44; CEDAW General Recommendation No. 30, above n. 33, para. 76.

⁶⁴ SR VAW Report, above n.13, para. 44.

“terrorism apology” (in **Peru**⁶⁵), or those forced into exile (such as in **Chile**⁶⁶). These exclusions “provide a serious challenge to the concept that human rights are inalienable” and are contrary to international human rights standards, including principles of non-discrimination.⁶⁷

37. In other contexts, including recently in **Tunisia**, the provision of reparations has been directed to certain “events”, privileging certain types of victims of gross and systematic violations over others.⁶⁸ This Special Rapporteur has expressed his concern that such an approach “gives rise, by its very nature, to different categories of victims and, ultimately, that it both manifests and results in the displacement of the notion of human rights”.⁶⁹
38. Given the difficulties in accessing judicial remedies in transitional or post-conflict societies, it is important that administrative reparations programmes have as wide coverage as possible in terms of violations covered and victims reached.⁷⁰ The UN Basic Principles recognise that coverage should include, at a minimum, gross violations of international human rights law and serious violations of international humanitarian law, without prejudice to the inclusion of other types of violations. As recognised by Professor Van Boven, the large number of victims means that:

reparative policies are very complex in terms of demarcation of beneficiaries and entitlements to and modalities of reparation. Nevertheless, also in these circumstances and in order to meet the requirements of justice, policies and programmes of reparation must aim to be complete and inclusive in affording material and moral benefits to all who have suffered abuses.⁷¹

(iv) There must be meaningful participation of victims in the design, implementation and monitoring of the reparations programme

39. Key aims of reparations programmes are recognising victims as rights holders, rebuilding trust in state institutions, and changing underlying discriminatory practices that led to violations in the first place.⁷² As such, the meaningful involvement of victims in the design and implementation of reparations processes is crucial, including to uphold victims’ rights.⁷³
40. The importance of ensuring in particular that women victims are able to meaningfully participate in designing, implementing and monitoring reparations programmes is stressed in a number of specific documents, including the Nairobi Declaration, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,⁷⁴ CEDAW’s General Recommendation on Women in Conflict and Post-Conflict contexts,⁷⁵ and

⁶⁵ See further ICTJ, ‘Reparations in Peru: From Recommendations to Implementation’, June 2013, pp. 5-6 available at: www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf.

⁶⁶ See further IACtHR, *Garcia Lucero v Chile*, above n. 16.

⁶⁷ ICTJ, ‘Reparations in Peru’, above n.65, pp. 5-6. See further See CAT, General Comment No. 3, above n. 32, para. 32.

⁶⁸ See ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Addendum: Mission to Tunisia (11–16 November 2012)’, UN Doc. A/HRC/24/42/Add.1, 30 July 2013, paras. 17-25.

⁶⁹ *Ibid.*, para. 22.

⁷⁰ See further OHCHR, ‘Rule of Law Tools for Post-Conflict States: Reparation Programmes’, above n.34, p. 15-21.

⁷¹ Theo Van Boven, ‘Victims’ Rights to a Remedy and Reparation: The new United Nations Principles and Guidelines’, in Ferstman et al. (eds.) *Reparation for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden: Martinus Nijhoff, 2009, p. 40.

⁷² Transitional Justice and Development Report, above n. 39, paras. 37-39; Impunity Principles Report, above n.30, para. 59(e); SR VAW Report, above n.13, para. 24; Nairobi Declaration, above n.7, para. 2.

⁷³ Impunity Principles Report, above n.30, para. 59(e).

⁷⁴ Maputo Protocol, as adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003. Arts. 4 and 10.

⁷⁵ CEDAW, General Recommendation No. 30, above n. 33, paras. 42-46; 81.

the UNSG Guidance Note.⁷⁶ Similar considerations also apply to actively ensuring the participation of victims from vulnerable or marginalised groups, including indigenous communities, refugees, those subjected to caste discrimination, and LGBTI individuals.⁷⁷ In relation to reparations programmes, for example, the Updated Impunity Principles provide that:

Victims and other sectors of civil society should play a meaningful role in the design and implementation of [reparations] programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes.⁷⁸

41. The ILA Procedural Principles recognise that “[v]ictims have a right to be heard, which should be respected in all phases of the reparation mechanism”.⁷⁹ The UNSG Guidance Note includes as an Operational Principle that “[m]eaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured”.⁸⁰ The need to consult meaningfully with victims throughout the reparations process has also been emphasised in the jurisprudence of the International Criminal Court.⁸¹
42. As these various texts underscore, participation is not only essential to understand and identify the specific interests and needs of victims but it is an important means to ensure victims’ agency – which is a central goal in and of itself, and a first step in reversing patterns of discrimination. As is recognised in the UNSG Guidance Note:

The process of obtaining reparations should itself be empowering and transformative. For example, UN’s approach to supporting the mapping, design, implementation, monitoring and evaluation of reparations should be victim-centred, so that victims of sexual violence are able to assume a proactive role in obtaining reparations. This has the potential of unsettling patriarchal and sexual hierarchies and customs which need to be anticipated and managed as part of the reparations process.⁸²

43. The norms relating to victim participation can be framed as including:
- **Non-discrimination:** The principle of non-discrimination requires that special measures may need to be taken to overcome barriers to participation; particular attention must be paid to the barriers to access justice faced by groups who are discriminated against or marginalised, and positive steps to overcome them;⁸³
 - **Access to information:** In order to participate effectively, victims must be provided with information about their rights, about justice processes which directly impact them and information about their progression;⁸⁴
 - **Effective representation:** Victims should be able to form groups who are capable of representing their specific interests, and care should be taken to ensure multiple channels of communication with groups and individuals representing a cross-section of views;
 - **Capacity and facility to participate:** This includes ensuring that victims have the means to participate substantively and effectively;

⁷⁶ UNSG Guidance Note, above n. 35, Operational Principle 6 and pp. 10-12.

⁷⁷ See CAT, General Comment No. 3, above n. 32, para. 32.

⁷⁸ Updated Impunity Principles, above n.30, Principle 32.

⁷⁹ ILA Procedural Principles, above n.9, Principle 2.

⁸⁰ UNSG Guidance Note, above n. 35, Operational Principle 6.

⁸¹ ICC Reparation Principles, above n. 18, paras. 202-206.

⁸² UNSG Guidance Note, above n. 35, p. 9.

⁸³ UN Basic Principles, para. 12 (b)-(d) and 13. CAT, General Comment No. 3, above n. 32, paras.29, 32-33; CEDAW, General Recommendation No. 30, above n. 33, para. 38(c).

⁸⁴ See further, section (v) below.

- **That there is meaningful and transparent impact:** Decision-makers must incorporate into the procedure a way in which victims' concerns are taken into account.⁸⁵
44. In **Peru**, preliminary research through a key report was an aid to “knowledgeable participation” of victims’ groups, which helped to “establish common ground for the debate on reparations more generally. It also helped, to some degree, to clarify expectations and the challenges that implementation of a reparations plan would entail”.⁸⁶ This was followed by workshops organised with victims by the Truth and Reconciliation Commission (“CVR”) and NGOs, and direct meetings with victims on the CVR’s proposals.⁸⁷ As Professor Orentlicher noted in her study, the engagement of civil society in shaping the reparations programme also “helped strengthen its own capacity to play an effective part in both the public policy debate over reparations that lies ahead and in an eventual implementation process”.⁸⁸
 45. In **Kenya**, the Truth, Justice and Reconciliation Commission included in its Statement Taking Form a section asking victims about their demands for reparations on an individual and collective level.⁸⁹
 46. In other situations – including **South Africa** and **Nepal** – a lack of consultation and large divergences between the visions of what the processes were trying to achieve led to increasingly adversarial positions being adopted by government on one side and civil society on the other.⁹⁰
 47. In enabling meaningful participation of victims it is also important to be fully cognisant of the fact that victims rarely speak with one voice, and to ensure that views are taken into account fairly having regard to this diversity. Each will typically have different interests and will have experienced victimisation in a unique way. For example, in **Uganda**, while victims’ groups often undertake joint advocacy, members’ views differ on fundamental issues of amnesty, reparations, and criminal trials. Victims of LRA crimes may have different views and objectives if family members were also abducted, and went on to commit crimes. Children may have ended up in militia groups for different reasons – to defend their ethnic group, with the tacit consent of elders and parents, or under the powerful influence of militia leaders; driven to enlist as a result of abject poverty, after suffering terrible losses in conflict; and others will have been abducted and forcibly conscripted.⁹¹
 48. Numerous persons may claim to speak “on behalf of a group”. Where victims’ groups are already constituted, legitimacy concerns have sometimes arisen with regards to who the group purports to represent, and whether the person representing the group is a legitimate representative. Victims’ groups may be dominated by political figures with certain issues

⁸⁵ See C. Correa, J. Guillerot and L. Magarrell, ‘Reparations and Victim Participation: A Look at the Truth Commission Experience’, in Ferstman et al. (eds.) *Reparation for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden: Martinus Nijhoff, 2009, p. 389.

⁸⁶ *Ibid.* pp. 395-96.

⁸⁷ *Ibid.*

⁸⁸ Independent Study on Best Practices, above n.29, para. 58.

⁸⁹ Report of the Truth, Justice and Reconciliation Commission Kenya, 2013, Volume IV, p.100.

⁹⁰ Correa et al., above n.85, p. 395 (in relation to South Africa). See further O Makhalemele, ‘Still not Talking: The South African Government’s Exclusive Reparations Policy and the Impact of the R 30,000 Financial Reparations on Survivors’ in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff, 2009). On Nepal, see further Advocacy Forum, TRIAL and REDRESS, ‘Paying Lip Service to Justice. The Newly Adopted TRC Act Breaches International Law and Flouts the Decision of the Supreme Court of Nepal’, June 2014, available at: [http://www.redress.org/downloads/publications/1407TRC_Act_UN_Submission_AF_TRIAL_REDRESS\(June2014\).pdf](http://www.redress.org/downloads/publications/1407TRC_Act_UN_Submission_AF_TRIAL_REDRESS(June2014).pdf).

⁹¹ REDRESS, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, September 2006, available at <http://www.redress.org/downloads/publications/childsoldiers.pdf>.

treated as important only when they served political ends, and victims' poverty and illiteracy can make them susceptible to manipulation.⁹²

49. Difficulties of participation, including who is seen as representing victims' views, can be particularly apparent when trying to ensure participation in the design of transitional justice mechanisms.⁹³ Drawing on lessons learned from experiences in Peru and Chile, Correa et al have concluded that:

[a] mixed strategy of smaller and larger representative channels, forms of direct communication to the larger constituencies, and different avenues of formal and informal participation that are transparent and evaluated periodically to adapt to evolving conditions, may be the best practice in the face of significant obstacles. Imperfection is likely, but is not a reason to discount the importance of finding a way to implement participatory policies. Governments need to be aware of the advantages that participation offers and not see only the obstacles they must confront to establish this type of channel.⁹⁴

50. Correa et al. point to a number of general lessons about representation and victim groups, summarised as follows:

- Victim heterogeneity should not be ignored, even while space for communication across groups should be encouraged where possible;
- Support should be offered to strengthen victim groups' organisational capacity and to facilitate communication;
- Victim groups need information that is accessible and trustworthy;
- Channels of communication and participation need to be both local and national;
- Human rights organisations and other NGOs play an important role as advocates for victim rights and should be involved, with the understanding that they may well have similar challenges in ensuring that their communication to and from victim groups is effective;
- Participation that is flexible in terms of representation and that takes place over time will have a better chance of reflecting growing capacity of victim groups.⁹⁵

(v) Victims must have equal and safe access to the reparations programme

51. As set out above, victims have the right to reparation, and must be treated equally and without discrimination. In the implementation phase of a reparations programme this will require positive steps to ensure that victims have access to the programme and are able to claim their rights.
52. A key aspect is ensuring that **information is given to victims** about the programme. This is recognised in the UN Basic Principles,⁹⁶ and is also reflected in the ILA Procedural

⁹² See further ICC, *Prosecutor v Laurent Gbagbo*, 'Redress Trust observations to Pre-Trial Chamber I of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence', 16 March 2012, paras. 40-45, available at:

<http://www.redress.org/downloads/1206%20Laurent%20Gbagbo%20pretrial%20chamber%20I.pdf>.

⁹³ See further C. Correa et al., above n.85, pp. 391-94.

⁹⁴ *Ibid*, p. 394.

⁹⁵ *Ibid*.

⁹⁶ UN Basic Principles, paras. 12(a) and 24.

Principles,⁹⁷ the UNSG Guidance Note,⁹⁸ the International Criminal Court’s Reparation Principles,⁹⁹ and the Updated Impunity Principles, which state that:

Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large number of victims have been forced into exile.¹⁰⁰

53. The UNSG Guidance Note recognises that “[o]utreach should take place in a language and through means that victims, literate or not, can understand and relate to and in a culturally appropriate manner. A mapping of the existing networks and organizations supporting victims is important to support these efforts”.¹⁰¹
54. A second crucial aspect is ensuring that **practical difficulties** – including low literacy, language, remote location, lack of access to public services, age, poverty or disability – and **cultural specificities** do not prevent victims from filing applications for reparations with the mechanism.¹⁰² The Commentary to the ILA Procedural Principles provides, for example, that:

Where victims speak different languages, they should be allowed to submit the claims in their own language. This can place a significant burden on a reparation mechanism, both in terms of staff required and processing time needed, but to remove this possibility would often deprive victims of the chance to participate in the process. The collection and registration processes should also take into account the needs of particularly vulnerable claimants, especially victims of sexual violence.¹⁰³
55. Tied to this, the provision of **urgent interim reparations** to address immediate needs and avoid irreparable harm may also be important to enable victims to access more comprehensive reparations programmes.¹⁰⁴
56. In addition, given the severe impacts such violations have on victims, and difficulties of access that many victims face, victims should be given time to come forward to claim reparations when they are ready: in a number of contexts unreasonably short **time limits** for lodging reparations claims has been a significant problem. For example, in **Brazil**, Law 9,140 of 1995 provided that a “petition for compensation may be submitted up to one hundred and twenty (120) days counting from the publication of this law” (Art. 10). As Cano and Salvão Ferreira explained: “To many, this seemed to short an interval. As one relative put it: ‘The violations went back thirty years, so why give the families such a tiny period of submission?’”.¹⁰⁵ A new law was subsequently adopted that enabled victims who had missed the deadline to file petitions.
57. These considerations are also important in the **standard of proof** required. A key challenge in registering victims of massive violations is “how to balance the need for guaranteeing the veracity of cases with the need for accessibility, especially when violations or even familial

⁹⁷ ILA Procedural Principles, above n.9, Principle 5.

⁹⁸ UNSG Guidance Note, above n. 35, p. 11.

⁹⁹ ICC Reparation Principles, above n.18, para. 205 (“[o]utreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance”).

¹⁰⁰ Updated Impunity Principles, above n.30, Principle 33.

¹⁰¹ UNSG Guidance Note, above n. 35, p. 11.

¹⁰² Nairobi Declaration, above n.7, Principle 1(E) (“Practices and procedures for obtaining reparation must be sensitive to gender, age, cultural diversity and human rights, and must take into account women’s and girls’ specific circumstances”).

¹⁰³ International Law Association, ‘Reparations for Victims of Armed Conflict’, Washington Conference Report (2014), Commentary to Principle 5, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

¹⁰⁴ See the UNSG Guidance Note, above n. 35, Operational Principle 7 (“Urgent interim reparations to address immediate needs and avoid irreparable harm should be made available”).

¹⁰⁵ I Cano and P Salvão Ferreira, ‘The Reparations Program in Brazil’ in P de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), p.115.

relationships are not documented”.¹⁰⁶ A number of factors “make it difficult, and sometimes impossible, for victims to provide the necessary information to prove their eligibility or to substantiate their claim”;¹⁰⁷ very often “the lack of evidence in individual claims is very much linked with the circumstances leading to the losses and violations that were sustained”.¹⁰⁸

58. In reparations programmes strict standards of judicial proof should not be required, and a flexible approach should be adopted as to the types of evidence accepted. The rules of the First Claims Resolution Tribunal for Dormant Accounts in Zurich, **Switzerland**, for the recovery of assets deposited prior to or during WWII, provided that “the claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account”. However, the banks had a duty to cooperate to provide all available documentation that might assist the claim.¹⁰⁹ In **Peru**, the reparations mechanism “recognized that in most cases people living in rural areas with low literacy or little access to public services would face difficulty in obtaining documents. In such cases the testimony of community leaders or witnesses has been accepted”.¹¹⁰
59. A third crucial aspect is ensuring that **victims’ safety, dignity and privacy is assured** throughout interaction with the programme. There should be special mechanisms in place to safeguard victims’ interests and protect them from secondary victimisation, trauma, ostracisation and reprisals.¹¹¹ Confidentiality at all stages is crucial “to encourage victims to come forward, to have faith and engagement in the process, and to protect them from further harm”.¹¹²
60. The UNSG Guidance note provides an example of where administrative processes breached this principle: in **Guatemala**, the cheques paying compensation to victims stated that they were victims of sexual violence, breaching their privacy and creating “unnecessary exposure and stigma”.¹¹³

(vi) Reparations programmes must have adequate organisational infrastructure and oversight

61. Linked to the above, reparations programmes must have adequate infrastructure to register and process claims in a timely fashion, to maintain the confidentiality of records, and to deliver the reparations awarded.¹¹⁴ The staff administering the programme and interacting with victims should be perceived as impartial and credible, and “must be trained to communicate with victims in a manner, which is appropriate for their culture and other circumstances”.¹¹⁵
62. In relation to the registration of claims, the commentary to the ILA Procedural Principles states that:

¹⁰⁶ ICTJ, ‘Reparations in Peru’, above n.65, p. 9.

¹⁰⁷ H Niebergall, ‘Overcoming Evidentiary Weaknesses in Reparations Claims Programmes’ in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff, 2009), p. 149.

¹⁰⁸ *Ibid.*, p. 150.

¹⁰⁹ *Ibid.*, p. 151.

¹¹⁰ ICTJ, ‘Reparations in Peru’, above n.65, p. 9.

¹¹¹ See, eg. UNSG Guidance Note, above n. 35, Principle 8 (“Adequate procedural rules for proceedings involving sexual violence and reparations should be in place”); Nairobi Declaration, above n.7, Principle 2(E).

¹¹² *Ibid.*, p. 11.

¹¹³ UNSG Guidance Note, above n. 35, p. 16, citing C. Duggan, and R. Jacobson, “Reparations of Sexual and Reproductive Violence: Moving from Codification to Implementation”, in R. Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP, 2009), p. 139.

¹¹⁴ See in particular ILA Procedural Principles, above n.9, Principles 6-9.

¹¹⁵ UNSG Guidance Note, above n. 35, p. 11.

Preferably the manner of processing of the claims and the criteria for the decision-making would be established when the claims are collected and registered so that all the required information and evidence can be assembled at that time. This will not always be completely possible, though, and therefore the opportunity to supplement the claims submission should not be excluded. Both to be consistent and to allow the efficient processing of large numbers of claims, the claims submission must be standardized. This is normally enabled through one or several claim forms which typically correspond to the different types of claims which can be brought in a mechanism. A claim form should provide the information in a way that enables its computerized processing, but it should also be easily understandable by the victims. While a claim form must therefore be as standardized as possible, it should also have a place where victims can tell “their story” in their own words.¹¹⁶

63. In addition, there should be appropriate structures in place for verification and monitoring of reparations awards. This is because:

Without adequate verification and monitoring arrangements, there is a risk that those who are intended to benefit from a reparations award may not, in fact, benefit. Moreover, implementation issues may cause tension and acrimony among victims. Most importantly, the potential of a reparations award to redress the harm with which it is concerned may go unfulfilled. For example, in respect of ongoing forms of reparation such as the establishment of a school or educational institution, failure to ensure that the institution has adequate resources, training and staff, may severely undermine the role and impact of the award.¹¹⁷

64. Monitoring can be carried out by both judicial and administrative processes. In the case of administrative monitoring, a number of mass claims processes, including the UN Compensation Commission, have used techniques such as matching and group sampling to enable large numbers of awards to be monitored efficiently.¹¹⁸ Regular reports, and audits of funds, should also be required under the rules of the programme.

(vii) The reparations provided must be adequate and proportional

65. In the context of mass violations and administrative reparations processes, the provision of adequate reparation presents conceptual and practical challenges, including how to interpret the obligation of states in view of the scale of violations and reparation needed. This has led to calls for a degree of flexibility and pragmatic approaches, focusing on what reparation can feasibly be provided. This approach risks failing to appreciate the guidance that recognised international standards on adequacy of reparation can provide. Making reparations subject to political and technical considerations only may result, and often arguably has resulted in violating victims’ rights.¹¹⁹ Furthermore, it poses moral and legal problems to accept that applicable standards cease to apply when the scale of violations reaches a certain threshold.
66. There is no clear-cut definition of adequacy though it is recognised as a standard for reparation in instruments such as the UN Basic Principles. Instead, a number of criteria are referred to, including appropriateness, proportionality and the circumstances of each case, for the determination of adequacy in any given situation.¹²⁰ Considering the victim-oriented approach underpinning the right to reparation, adequacy can therefore be understood as entailing that the form of reparations must fully take into consideration the specificity of victim’s experiences, particularly the seriousness of violations and harm.

¹¹⁶ Commentary to ILA Procedural Principles, above n.103, commentary to Principle 6.

¹¹⁷ Capone et al., ‘Education and the Law of Reparations’, above n.62, p.109.

¹¹⁸ *Ibid.*, pp. 112-114.

¹¹⁹ For example, governments in both **El Salvador** and **Guatemala** claimed lack of resources for financing reparation resulting in non-implementation of reparation measures in El Salvador, and limited measures and delays in Guatemala: See further A Segovia, ‘The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A history of non-compliance’ in P de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), p.662. In **South Africa**, the government, without consulting victims, defined the amount of compensation at a level substantially lower than that recommended by the Truth and Reconciliation Commission: see further Makhalemele, above n.90.

¹²⁰ UN Basic Principles, paras. 15 and 18.

67. Yet, the perceived vagueness of adequacy as a general standard may be viewed by duty-holders and relevant actors as providing considerable leeway and broad scope for interpretation. Administrative reparations processes, which are typically the outcome of political processes and compromises, may therefore result in measures that do not reflect the seriousness of violations and harm, and/or are incomplete. Victims' rights, needs and concerns are frequently subordinated to other policy goals, including development, reconstruction and reconciliation. Reparation measures may also be used to advance partisan interests or favour certain groups, a concern that has been raised in relation to recent measures taken in the **MENA region** following the Arab uprisings, including for example, **Tunisia**.¹²¹
68. Clearer guidance on the meaning of adequacy can be derived from existing principles and practice, focusing on both process and substance. As set out above, any reparations measure should be based on consultations with victims, and should enable victims to articulate what they consider adequate forms of reparations. As emphasised in the Operational Guidance set out in the UNSG Guidance Note: “[c]onsultations with victims are particularly important in order to hear their views on the specific nature of reparation”.¹²² This participatory approach is victim-oriented and recognises that reparation is a right that needs to respond to particular violations and harm experienced, rather than being provided as a measure of state fiat.¹²³
69. This approach is also important to ensure that marginalised members of society are effectively able to articulate needs and preferences, including gender-perspectives. The UNSG Guidance Note goes on to state that, “in circumstances when collective reparations are intended to target a wider group of beneficiaries such as communities particularly affected by conflict, those conducting consultations should ensure that the views of victims of sexual violence are represented, while taking into account considerations of privacy and confidentiality”.¹²⁴ Conversely, the lack of consultation and participation may result in forms of reparations that are incomplete, inaccessible, inappropriate and ultimately ineffective in redressing the wrong.
70. The substance of reparations depends on the particular context. States have some discretion in developing a reparations programme. However, there should be complexity in the forms of reparations provided if the situation of the victims and the nature of the violations so require. All forms of reparations should be provided where this is appropriate in light of the kinds of violations and the harm suffered.¹²⁵ This includes both material and symbolic, as well as individual and collective forms that are seen as mutually reinforcing. This has been recognised both by this Special Rapporteur, by the UNSG Guidance Note, and in the work leading to the Updated Impunity Principles.¹²⁶ As stated in the report accompanying those Principles:

To make it feasible to provide benefits to all victims of all relevant categories of crime, it is important to design a programme that distributes a variety of material and symbolic benefits and does so in a coherent fashion. A reparations programme is internally coherent if it establishes relations of complementarity or mutual support between the various kinds of benefits it distributes.¹²⁷

Similarly, collective reparations can complement individual reparations, but as the UNSG Guidance Note recognises, they tend to serve different purposes, and as such, “collective

¹²¹ See, eg. ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Addendum: Mission to Tunisia (11–16 November 2012)’, UN Doc. A/HRC/24/42/Add.1, 30 July 2013, paras. 17-25.

¹²² UNSG Guidance Note, above n. 35, p. 1.

¹²³ Contrast the experience in **South Africa**, described in Makhalemele, above n.90.

¹²⁴ *Ibid.*, p. 8.

¹²⁵ See OHCHR, ‘Rule of Law Tools for Post-Conflict States: Reparation Programmes’, above n.34, pp. 22-27.

¹²⁶ See eg. ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’, UN Doc. A/HRC/21/46, 9 August 2012; UNSG Guidance Note, above n. 35, Operational Principle 1 (‘Adequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparation’), and pp. 5-6; Impunity Principles Report, above n.30, para. 59(c).

¹²⁷ Impunity Principles Report, above n.30, para. 59(c).

reparations are not a substitute for individual reparations”.¹²⁸ The appropriateness of the forms of reparations should be determined, taking into consideration the nature of violations and the harm caused, and the views and needs of victims.

71. The particular forms of reparations provided, such as compensation and rehabilitation, should bear a clear relation to the seriousness and type of violation/harm suffered. To this end, states may distinguish between victims, including by using categories of victims entitled to particular benefits and/or prioritising claims or measures where appropriate.¹²⁹
72. Notwithstanding the importance of symbolic reparations, at least some material reparations will typically be appropriate. Where such material reparations are not fully reflective of the harm, they must be complemented by measures that recognise as much as possible the specific experiences and harm suffered by victims, and the rights that have been violated. The views of victims, as expressed in consultations and other processes employed by the programme concerned, are critical to determine adequacy of measures taken, thereby linking the process and substance components of reparation.
73. Limited resources and competing demands may impact determining the adequacy of reparations in the particular circumstances. However, these challenges do not absolve a state from its obligation under international law to provide adequate reparation. A state must therefore demonstrate that it has used available resources and made efforts to obtain the resources needed to provide adequate forms of reparations, both in terms of quality and quantity.
74. The importance of judicial oversight is particularly evident in respect of adequacy. While judicial bodies may grant states a certain level of discretion (in determining what is appropriate in the circumstances), an impartial external body can evaluate the degree to which the procedural and substantive elements of ‘adequacy’ have been taken into account when identifying forms of reparation and implementing a reparations programme.¹³⁰

(viii) The reparations must be effective and implemented

75. In addition to being “adequate”, reparation must also be “effective” and “prompt”.¹³¹
76. Effectiveness requires that adequate reparation is actually provided, in a form that is usable by the victim. Promptness requires that such reparation is provided as expeditiously as possible.
77. Significant issues have arisen in administrative reparations programmes concerning both the effectiveness and the promptness of reparations provided. At one end of the spectrum, in a number of contexts there has been criticism of payment of compensation in the form of government bonds (which may take years to mature, and in a country with a weak or unstable economy, may not guarantee that the money will be forthcoming).¹³² In other contexts, money has been provided in the form of lump-sum cash payments despite the fact that many

¹²⁸ UNSG Guidance Note, above n., p.7. See also General Comment No. 3, above n. 32, para. 32.

¹²⁹ See, eg. the prioritisation of different categories of victims proposed by the Kenyan Truth, Justice and Reconciliation Commission: Report of the Truth, Justice and Reconciliation Commission Kenya, 2013, Volume IV, pp. 102ff, with “most vulnerable” receiving the highest priority.

¹³⁰ See further Section (ix), below. See further, eg. *19 Tradesmen v Colombia* (and seven other cases), Monitoring and Compliance, Order of the President of the IACtHR, 8 February 2012.

¹³¹ UN Basic Principles, para. 11(b).

¹³² See eg. in relation to such criticisms in respect of the Argentinean programme, see J M Guembe, ‘Economic Reparations for Grave Human Rights Violations: The Argentinean Experience’, in P de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006) 21-54, at p. 41.

victims, including predominantly female victims, did not have access to a bank account in which to deposit the money.¹³³

78. At the other end of the spectrum are countries where reparations measures have been recommended by Truth and Reconciliation Commissions or other bodies, but legislation implementing those measures has stalled in Parliament, meaning that many years after mass violations have taken place, only part of the reparations recommended, or no reparations at all has been provided. This is the case, for example, in **Timor-Leste**, where a failure to pass the implementing legislation has meant that reparations have not been delivered. In **South Africa**, the recommendations of the Truth Commission have still not been fully implemented, even though funding is available within the “President’s Fund”.¹³⁴
79. Reparations programmes must have adequate structures and funding in place, and adequate rules on compliance and enforcement, to ensure that reparations are delivered.¹³⁵ International experience has shown that the most effective model for financing has been direct financing from the State budget (as happened in **Argentina**, **Brazil** and **Chile**), rather than the creation of special funds. Where such special funds were established in **El Salvador**, **South Africa**, **Guatemala**, **Malawi** and **Haiti** in each case insufficient resources were provided to be able to implement the recommendations on reparations of the respective Truth Commissions.¹³⁶

(ix) Judicial remedies must always be available to victims of gross violations of human rights and serious violations of international humanitarian law

80. The UN Basic Principles, and the jurisprudence of international courts and treaty bodies, recognise that victims of gross human rights violations have the right of equal access to an effective judicial remedy.¹³⁷ There is still an important role for both domestic and international courts and tribunals, including regional human rights courts, courts exercising universal jurisdiction and international criminal courts, in this process, and victims must have the option to access them.
81. Administrative programmes can only ever complement rather than substitute access to the courts: ideally, the design of administrative reparations programmes will be sufficiently inclusive, responsive to the wishes and needs of victims, transparent, easy to use, efficient and seen as just, that the advantages of using the programmes will outweigh the prospect of gaining reparation before the courts or other established mechanisms.¹³⁸ In addition, they will also ideally put victims in the position to participate meaningfully in a criminal trial (e.g. rehabilitation programmes can help restore victims’ health sufficiently to enable them to testify in court and prevent re-traumatisation afterwards; compensation can help to restore the livelihood of victims sufficiently to enable them to travel to court to follow proceedings).
82. Courts and tribunals can act as important correctives – to spur states to implement (or improve) reparations programmes and to uphold their other obligations to investigate and

¹³³ See UNSG Guidance Note, above n. 35, p. 17, citing See B. Goldblatt, “Evaluating the Gender Content of Reparations: Lessons from South Africa”, in R. Rubio-Marín (ed.), *What Happened to the Women: Gender and Reparations for Human Rights Violations* (Social Science Research Council, 2006).

¹³⁴ Sufiya Bray, ‘Reparation in South Africa: the ‘unfinished business’ of the TRC?’, in Pan-African Reparation Perspectives, July 2014, pp. 4-5, available at: <http://www.redress.org/newsletters/pan-african-reparation-perspectives-bulletin>.

¹³⁵ See ILA Procedural Principles, above n.9, Principles 9 and 10.

¹³⁶ A Segovia, ‘Financing Reparations Programmes: Reflections from International Experience’ in P de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006) 21-54, at p. 41.

¹³⁷ UN Basic Principles, para. 12; CAT, ‘General Comment No. 3’, above n.32, para. 20 (“While collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress”).

¹³⁸ See further commentary to the ILA Procedural Principles, above n. 103, commentary to Principle 8.

prosecute gross human rights violations.¹³⁹ For example, recently in **Yemen**, victims successfully sued the government before an administrative court to compel it to provide medical treatment in line with a presidential decree.¹⁴⁰

83. The experience of a number of countries in **Latin America**, which has a strong regional human rights system and which have been the subject of investigations and trials using universal jurisdiction for international crimes, also shows that judgments from international bodies can provide important impetus for processes of accountability, truth and reparation at the domestic level.¹⁴¹
84. In addition, courts and tribunals – whether domestic or international – can serve as important alternative forums for redress for individuals – providing a way of ascertaining, acknowledging and recording the truth of what happened in an individual case, a mechanism through which individualised reparation can be provided, and a way to establish responsibility of and punishing the perpetrator.¹⁴² Each of these can contribute in a marked way to restoring the dignity of the individual survivor. As Malamud-Goti and Grosman have argued, even if only a very small number of victims in fact access the courts in this way (or are given access through international criminal proceedings), or succeed in their claims, the effect of establishing the truth and punishing the perpetrator in restoring the victims’ dignity has an important symbolic meaning for other victims.¹⁴³
85. As such, the UNSG Guidance Note provides that:

administrative reparations programmes should not preclude victims of conflict-related sexual violence from obtaining reparations through courts; all victims should have access to effective judicial remedies which include adequate, prompt and full reparation for the harm suffered. Domestic or international courts should take into account and complement reparations awarded by administrative reparations programmes when deciding on redress for victims of conflict-related sexual violence.

Ensuring effective access to judicial remedies may require assistance and support to complainants as well as the removal of barriers to access to justice, including discriminatory barriers particularly affecting women. Effective judicial remedies also require that decisions of judicial bodies are executed without unreasonable delay.

The UN cannot endorse peace agreements which preclude either access to judicial remedies or administrative reparations programmes for victims of conflict-related sexual violence and other gross violations of international human rights law, as well as serious violations of international humanitarian law.¹⁴⁴

¹³⁹ On the role that international human rights courts and bodies have played, and some difficulties arising in the context of mass violations, see further L. Oette, ‘Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations’, in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff, 2009) 217-242.

¹⁴⁰ *Basam Yassen Abdu al-Akhaly v Reconciliation Government* (2012) Sana’a Administrative Court of First Instance, Judgment No. 70/2012. Further details available at: <http://www.yemenat.net/news28828.html>.

¹⁴¹ P. de Greiff, ‘Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations’, in P. de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006) 1-20, at note 23; N. Roht-Arriaza, ‘After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity’, UC Hastings Research Paper No. 96, *Human Rights Quarterly*, Forthcoming, 2014, pp. 7-8, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409077.

¹⁴² See further J Malamud-Goti and L Grosman, ‘Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies’, in P de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006) 539-559, pp. 552-554.

¹⁴³ *Ibid.*, at 553.

¹⁴⁴ UNSG Guidance Note, above n. 35, pp. 6-7 (citations omitted).

(x) Reparations programmes must be matched by truth-telling, investigations and prosecutions and legislative and institutional reform

86. As this Special Rapporteur has repeatedly emphasised, no single pillar of transitional justice will be adequate or effective in the absence of the others. As such, and in order to provide justice to victims, administrative reparations programmes must be matched by truth-telling, investigations and prosecutions into at least violations amounting to crimes under international law, and legislative and institutional reform.
87. States are required under international human rights law to pursue each of these other measures following mass violations.¹⁴⁵ In addition, they are also often important measures of satisfaction to victims that are part of the overall ‘reparation’ or repair that they experience.¹⁴⁶ In the absence of these other transitional justice measures, “the benefits [a reparations programme] distributes risk being seen as constituting the currency with which the State tries to buy the silence or acquiescence of victims and their families”.¹⁴⁷
88. For these reasons, one type of measure should not be ‘delayed’, and considered only once others are undertaken. As the Special Rapporteur has stated:

The various measures should be “externally coherent”, meaning that they should be conceived of and implemented not as discrete and independent initiatives but rather as parts of an integrated policy. Clarifying these interrelationships also helps us see why a bargain that has been tempting in many experiences is likely to be self-defeating. ... Measures should not be traded off against one another. Authorities must resist the tendency to expect victims to ignore lack of action in one of these areas because action is being taken in others. In addition to conflicting with international obligations that the State may have with respect to *each* of the measures under this mandate, such policy is likely to undermine the possibility that whatever measures the Government does implement will be interpreted as justice measures.¹⁴⁸

V. CONCLUSION

89. REDRESS appreciates the work that the Special Rapporteur has already done to underscore the existing legal obligations underpinning transitional justice measures. We encourage the Special Rapporteur, as the appropriate mandate holder, to continue to lead on this issue, and would urge you to convene a working group to canvass this further.
90. REDRESS has been working extensively in this area on the legal remedies side, and would welcome further discussion on how best to harmonise this experience with the ongoing developments in the transitional justice field. Our primary concern is that despite the fact that victims of gross violations of human rights and serious violations of international humanitarian law have the same rights, regardless of what procedure is employed, there is divergence in practice. This divergence can give rise to inconsistencies in their treatment, potentially having negative ramifications for victims’ ability to exercise their rights. If the divergence is allowed to remain and even to widen, it could potentially undermine the framework for victims’ rights in the context of mass violations. It could possibly also give rise to a two-tier set of standards wherein the biggest and most widely experienced violations have the weakest potential for enforcement.

¹⁴⁵ See further UN Basic Principles.

¹⁴⁶ See further *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/22/45, 28 January 2013, § 62. See also *General Comment on Article 19 of the Declaration*, UN Doc. E/CN.4/1998/43, 12 January 1998, § 71; M. Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, UN Doc. E/CN.4/2002/71, 8 January 2002, § 88.

¹⁴⁷ Impunity Principles Report, above n.30, para. 59(d).

¹⁴⁸ ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff’, UN Doc. A/HRC/21/46, 9 August 2012, para. 27.