

Chapter 2

Victim-Oriented Perspectives: Rights and Realities

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Abstract For long the plight of victims of gross violations of human rights has been ignored because of legal shortcomings, political obstacles, economic factors and the incapacity of victims themselves to assert their rights and to pursue their claims. This is a reality at the domestic scene but it is also true that international law is not victim-oriented. However, there are recent, more positive, trends in the context of the humanisation of international law. These trends are reflected in the law and practice of international tribunals and in victim-related normative prescriptions, such as in the United Nations 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. One of the complex issues of reparative justice is the question to what extent historical wrongs, such as serious crimes committed under colonial or authoritarian rule, continue to incur liability in legal and/or moral terms. Another complex issue is posed by the massive proportions of gross violations and serious crimes which may well require resort to collective redress and collective means of reparation. Further, the question is raised of the relationship between reparation programmes and development programmes. It is finally observed that the wrongs of the past should be squarely faced in order to prevent their repetition.

Keywords Victims • Reparation • Human rights • Transitional justice • Reparative justice • Victim-oriented

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2.1 Silence and Disregard

More than forty years ago UNESCO—the United Nations Educational, Scientific and Cultural Organization—published a significant work, an anthology of texts on human values brought together from all periods, all continents and a wide variety of cultures under the title *Birthingright of Man*.¹ The texts were drawn from every kind, from laws to proverbs, from political studies to religious invocations, from funerary inscriptions to tales and songs. This remarkable selection of texts was to mark the twentieth anniversary of the Universal Declaration of Human Rights. The preface was written by the then Director General of UNESCO, René Maheu. I am citing a few sentences from this preface:

The groans and cries to be heard in these pages are never uttered by the most wretched victims. These, throughout the ages, have been mute. Wherever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history; for history records only the words and deeds of those who are capable, to however slight a degree, of ruling their own lives, or at least trying to do so. There have been – there still are – multitudes of men, women and children who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the effort to secure recognition of that dignity by others. They are silent. The lot of the victim who complains and is heard is already a better one.²

When I submitted in the early 1990s of the last century, in my capacity as Special Rapporteur of a UN Sub-Commission on Human Rights, a report on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, I chose these words of René Maheu as the prologue of my study.³ While making in that report the case for reparative justice for victims of gross violations of human rights, and thus laying the basis for UN basic principles and guidelines on this subject, I felt bound to point to the striking gap between, on the one hand, standards and aspirations and, on the other hand, the realities of leaving victims without redress and remedies. I noted that large categories of victims remain unnoticed, unacknowledged and unattended. Domestic legal and social orders disclose *legal* shortcomings such as inadequate laws, restrictions in the definition of the scope and nature of violations, the application of statutory limitations, the operation of amnesty laws, impediments in getting access to justice and restrictive attitudes of courts. Also *political* obstacles belittle the rights and interests of victims, notably the unwillingness of authorities and society to acknowledge that serious wrongs were committed. *Economic* factors also operate to the detriment of victims in view of alleged or actual shortage of economic and financial resources. And last but not least many victims suffer from the *incapacity*,

¹ Hersch 1969.

² Maheu R, Preface, in Hersch 1969, pp. 3, 4.

³ UN Commission on Human Rights (1993) Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr Theo van Boven, Special Rapporteur, UN doc. E/CN.4/Sub.2/1993/8, 2 July 1993.

the lack of means and methods at their disposal, to advance their interests and pursue their claims.⁴

Many examples can be cited, from the past till the present, about victims of serious breaches of the law and flagrant deprivation of rights who are ignored, neglected and who find themselves in permanent and hopeless states of denial.⁵ They linger in different settings and situations: armed conflicts, situations of violence including domestic violence and sexual exploitation, as objects of crime and terror, or stricken by the misery of abject poverty and deprivation. For instance, the UN Special Rapporteur on Violence against Women, portrayed not so long ago a horrific picture of sexual violence after her visit to the Democratic Republic of Congo (DRC). These abuses are widespread and committed by non-State armed groups, the armed forces of the country, the national police and increasingly also by civilians. United Nations peace keepers were also involved, either as perpetrators or in their failure to prevent and protect. The Special Rapporteur concluded that in a handful of cases courts have ordered individual perpetrators as well as the State to pay modest reparations to the victims but so far the Government had not paid any reparations to a single victim who had suffered violence at the hands of State agents.⁶

In a survey drawn up by the London-based organisation REDRESS, on the basis of a study relating to law and practice on reparation for torture victims in thirty countries, a bleak portrait of impunity and lack of reparative justice was presented. I quote:

The overall findings indicate that laws are inadequate and/or lacking in most of the countries under scrutiny and, even where present, rarely implemented. The absence of safeguards and the impunity afforded to perpetrators of torture contribute greatly to the prevalence of torture. Impunity is the result of a lack of political will and/or the failure to overcome severe institutional deficiencies to combat torture. The outcome is that torture remains unacknowledged, victims suffer in silence and there is little, if any, official support for survivors. This is especially true for those, for example minorities, who suffer torture more frequently than other groups.⁷

The overall perspective of the position of victims remains one of marginalisation, neglect and discard. The well-known international criminal law expert Cherif Bassiouni, with whom I worked together on the right to redress and reparation, wrote some years ago: “International law is not victim-oriented”.⁸ He was right and let me mention a few examples from jurisprudence and practice of two principal organs of the United Nations. It appears that for them, as well as for many politicians and

⁴ Idem, para 124.

⁵ Cohen 2001.

⁶ UN Human Rights Council (2008) Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, Mission to the Democratic Republic of the Congo, UN doc. A/HRC/7/6/Add.4, 28 February 2008.

⁷ REDRESS (2003) *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries*, p. 41.

⁸ Kristjánsdóttir 2009, p. 167.

diplomats, the rights of victims and survivors are at best an afterthought. Thus, the International Court of Justice in its Bosnia-Genocide judgment (2007) showed a narrow victim approach and considered that a declaration of wrongfulness was a sufficient form of providing adequate reparation for the harm suffered by the victims and survivors of Srebrenica.⁹ Another example was the handling by the UN Security Council of the findings and recommendations of the International Commission of Inquiry on Darfur, chaired by Antonio Cassese. One of the recommendations of this Commission was that the Security Council immediately refers the situation of Darfur to the International Criminal Court (ICC), pursuant to Article 13(b) of the ICC Statute.¹⁰ And it was indeed at that time in 2005 a major step that the Security Council, in spite of the strong misgivings of the USA regarding the ICC, did refer the Darfur situation to the Prosecutor of the ICC.¹¹ However, another important recommendation of the International Commission of Inquiry on Darfur, which would provide for the establishment of a Compensation Commission designed to afford reparation to the victims of the crimes, irrespective whether or not the perpetrators of such crimes had been identified, was not acted upon by the Security Council.

2.2 New Trends

In spite of an overall depressive scene of victim's neglect, internationally and domestically, we are also witnessing hopeful signs that may indicate some change of mind, a re-orientation in the *opinion iuris* and morals. This re-orientation can be attributed to a reappraisal of values in societies that went through dark periods of conflict and contempt of human dignity. Here the notion of "transitional justice" came up. It comprises—to cite the UN Secretary-General in a significant report on the rule of law and transitional justice in conflict and post-conflict societies—"the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale abuses, in order to ensure accountability, serve justice and achieve reconciliation."¹² In pursuing the quest for justice and reconciliation a victim-centered approach was taking shape. This implied the establishment of historical records as a crucial condition for meting out justice to perpetrators and affording reparations to victims.

In fact, only in recent times, reflecting a process of "humanisation of international law",¹³ victims' rights are receiving wider recognition. This is evident in international human rights instruments and in opinions of international human rights

⁹ ICJ *Bosnia Herzegovina v Serbia and Montenegro*, Application of the Convention on the Prevention of the Crime of Genocide, Judgment 26 February 2007, I.C.J. Reports 2007, p. 43.

¹⁰ UN Commission of Inquiry (2005) Report of the International Commission of Inquiry on Darfur (established by Security Council Resolution 1564 of 18 September 2004), UN doc. S/2005/60, 11 February 2005.

¹¹ Security Council Resolution 1593 of 31 March 2005.

¹² Report of the Secretary-General (2004) *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, UN doc. S/2004/616, 23 August 2004, para 8.

¹³ Meron 2006.

adjudicators, notably the European and Inter-American Courts of Human Rights. In the same spirit, the Statute of the International Criminal Court opened up ways and means for victims to participate in the proceedings before the Court and to be afforded reparations.¹⁴ Along the same line, victims' rights were recognised in transitional justice processes, particularly in a number of countries in Latin America and in Africa. In the light of these developments, attempts were made to further spell out and create mechanisms and tools for combating impunity and strengthening the normative basis of reparative justice. Thus, the UN General Assembly adopted in 2005, after a lengthy process of preparations, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Reparation Principles).¹⁵ In the same year, the then UN Commission on Human Rights endorsed an Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Impunity Principles).¹⁶ Further, as an expression of strong interest and commitment on the part of national and international civil society, women's rights groups and activists adopted in 2007 the Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation.¹⁷

Restoring the rule of law in societies that have been suffering from serious violations of basic norms of humanity requires the building of effective domestic justice capacities. Reparation to victims, in its various modalities and in individual and collective dimensions, was to be devised and materialised within the broader transitional justice context. In this regard the Impunity Principles, just referred to, provide important guidance in mapping out (i) The Right to Know, (ii) The Right to Justice, (iii) The Right to Reparation and Guarantees of Non-Recurrence, as a basic trilogy to serve the plight of victims.¹⁸ The Right to Know as an inalienable right of people and as a right of victims and their families includes the right to learn the truth about heinous crimes committed and circumstances and reasons leading thereto as well as what happened to victims, individually and collectively. The Right to Justice entails the duty of States to carry out prompt and impartial investigations of violations of human rights and international humanitarian law and bring to justice those responsible for serious crimes under international law. The Right to Reparation completes this trilogy of basic justice. It is a victim-oriented right involving a duty on the part of the State to provide reparation and the possibility for victims to seek redress from the perpetrator. Obviously, the right to reparation is also the main thrust of the

¹⁴ Article 68 ICC Statute (Protection of the victims and witnesses and their participation in the proceedings), Article 75 ICC Statute (Reparations to victims).

¹⁵ 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, adopted by UN General Assembly Resolution 60/147, 16 December 2005.

¹⁶ UN Commission on Human Rights (2005) Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

¹⁷ www.womensrightscoalition.org/reparation

¹⁸ See Impunity Principles, *supra* n. 16.

Reparation Principles. It includes the following modalities: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and prevention.¹⁹ It fits in this pattern that the trilogy of basic justice, consisting of the right to know the truth, the right to justice and the right to reparation, finds clear expression in one of the newest core international human rights treaties: the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.²⁰

An illustrative, albeit somewhat rhetorical, expression of a victim-oriented approach reflecting an evolving *opinio iuris*, are the Declaration and Programme of Action adopted in 2001 at Durban by the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.²¹ There is hardly any other United Nations document that gives so much prominence to the position and the interests of categories of victims, among them Africans and people of African descent, indigenous peoples, migrants, refugees, Roma and Sinti, persons belonging to ethnic, religious and linguistic minorities. The Durban texts are also explicit as regards the provision of effective remedies, recourse, redress, and compensatory measures at national, regional and international levels.

One of the major issues of discord causing deep political, legal and moral tensions in the Durban process, was the question of crimes committed in the past at the times of colonial rule and subjugation, slavery and slave trade. Western countries with a more than dubious record in this regard strongly opposed that this issue be taken up. They were most reluctant or rather unprepared to face legal and for that matter financial consequences for wrongs committed in the past that under contemporary international law would be categorised as crimes against humanity. Against this background the then German Minister for Foreign Affairs, Joschka Fischer, spoke enlightening words at Durban:

... At this conference we must begin with the past. In many parts of the world the pain of the persisting consequences of slavery and colonial exploitation still sits deep. Past injustice cannot be undone. But to recognise guilt, assume responsibility and face up to historical obligations may at least give back to the victims and their descendants the dignity of which they were robbed. I should like therefore to do that here and now on behalf of the Federal Republic of Germany. Our historical responsibility in particular, but also the universal principles of humanity and justice therefore demand of Europe today a special solidarity with the developing countries.²²

¹⁹ See Reparation Principles, *supra* n. 15; principles 18–23.

²⁰ International Convention for the Protection of All Persons from Enforced Disappearance, adopted by UN General Assembly Resolution 61/177 of 20 December 2006 and entered into force on 23 December 2010, Article 24.

²¹ United Nations Department of Public Information (2002) World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Declaration and Programme of Action. Foreword by Mary Robinson, UN High Commissioner for Human Rights and Secretary-General of the World Conference.

²² Speech by Joschka Fischer, Minister of Foreign Affairs of the Federal Republic of Germany at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban on 1 September 2001, Press release German delegation, 1 September 2001.

The spirit expressed in these words finally prevailed in the texts adopted in Durban by consensus, albeit in some instances in the form of skillful diplomatic acrobatics such as in the phrase: “We acknowledge that slavery and the slave trade are a crime against humanity *and should always have been so*” (my italics, TvB).²³ The same spirit also transpired in words included in the Durban Declaration: “We acknowledge and profoundly regret the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies”.²⁴

However, the Durban texts carefully avoided language that could be interpreted as supportive of *legal* obligations towards those peoples and nations that demand reparation including compensation for the historical wrongs their ancestors had undergone and the lasting effects thereof. Thus, texts referred to *moral* obligations along the following lines: “We are aware of the moral obligations on the part of all concerned States and call upon these States to take appropriate and effective measures to halt and reverse the lasting consequences of those practices”.²⁵ In this excursion to Durban, some elements of the statement made by the Presidency of the European Union should be noted when he clarified the position of the EU Member States. He observed that the Durban texts were political and not legal documents and thus cannot impose obligations, a liability or a right to compensation. Neither can these texts, according to the same speaker, affect the legal principle which precludes retrospective application of international law in matters of State responsibility.²⁶ This leads one to remind again what Cherif Bassiouni said: “International law is not victim oriented”.²⁷ Balancing between the legal and the moral implications of justice, the EU Presidency offered that the EU acknowledged and deplored the immense suffering caused by past and contemporary forms of slavery and slave trade wherever they have occurred as well as the most reprehensible aspects of colonialism.²⁸

The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance was held in Durban in 2001. A major follow-up event, a review conference, was convened eight years later in Geneva but did not further advance the issue of repairing historical wrongs. On my part, I do not want to go so far as to submit that repairing historical wrongs is a precondition for actively pursuing reparative justice, at domestic and international levels, in support of those victimised by recent and present-day serious crimes under international law. Yet, as was stated in Durban, echoing the words of the German Foreign Minister,

²³ Supra n. 21, Declaration, para 13.

²⁴ Ibid., para 100.

²⁵ Ibid., para 102.

²⁶ Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 31 August–8 September 2001, UN doc. A/CONF.189/12, Chapter VII, para 4.

²⁷ Supra n. 8.

²⁸ Supra n. 26, Chapter VIII, para 6.

remembrance of the crimes or wrongs of the past, wherever and whenever they occurred, and unequivocal condemnation of racist tragedies and telling the truth about history are essential elements for international reconciliation and the creation of societies based on justice, equality and solidarity.²⁹

2.3 Towards an Inclusive Approach to Reparative Justice

Earlier in this presentation I recalled the state of silence and disregard that determined the fate of victims of gross violations of human rights and serious crimes under international law. I noted, however, positive new trends in the normative sphere and in the institutional domain to underscore the postulates of truth, justice and reparation. I further noted legal and moral dimensions and prescriptions as mutually supportive but equally divisive in the political discourse; legal obligations as enforceable demands of justice and moral obligations as voluntary undertakings and standards of achievement. In the dialectics of the tension between law and morality the perspective of the victim needs clarification and appraisal. With the recognition that victims have a basic right to a remedy and reparation, as spelled out in the earlier mentioned UN Reparation Principles and Guidelines,³⁰ its implementation requires common efforts on the part of governance, civil society groups and others working with and representing victims. It is encouraging that domestic courts and international tribunals, notably the Inter-American Court and the European Court of Human Rights, demonstrate an increasing readiness to afford reparative justice to victims, in particular in cases of violation of core rights such as the right to life and the right to be protected against torture and other cruel and inhuman treatment. Judicial mechanisms, meting out retributive justice and affording reparative justice, play a crucial role in effectively serving the plight of victims, individually and collectively. Equal and effective access to these mechanisms is an essential requirement. However, the most vulnerable segments among victimised groups and persons are encountering many obstacles depriving them of access to reparative justice. This underscores the need for providing special assistance to such groups and persons.

A major problem that complicates an inclusive approach to reparative justice is, as situations of repression, conflict and abuse dramatically bear out, the massive proportions of the harm inflicted on people. Thus, the types of situations referred to the International Criminal Court—Uganda, the Democratic Republic of Congo, Darfur, the Central African Republic, Kenya, Libya—all involve systematic and large-scale attacks against civilian populations, affecting many thousands if not hundreds of thousands of women, men and children. The reparative capacities of the Court and its Trust Fund for Victims are limited as regards the demarcation of beneficiaries and the entitlements to and modalities of reparation. The ICC

²⁹ Supra n. 21, Declaration, para 106.

³⁰ Reparation Principles, supra n. 15.

also faces complexities as to actual or potential numbers of victims who are to be allowed to participate in its proceedings. The ICC as an international complementarity organ of justice is a challenging project trying to come to grips with macro and massive criminality and the victims thereof. In this respect, it faces complex problems and dilemmas of inclusion and demarcation, equally encountered at national levels.

The question arises whether in situations where mass atrocities have occurred, reparative justice may be better served by collective programmes and measures rather than by litigation and court decisions on individual claims. In fact, there are no “one size fits all” solutions to reparative justice. The Reparation Principles provide a good deal of latitude in affording reparations to victims. While perceptions and policies of reparation are mostly discussed and understood in monetary terms, the importance of non-monetary forms of reparation, often referred to as “symbolic reparations”,³¹ must be appreciated as means to render satisfaction. Acknowledgement of harm inflicted and suffered and attribution of responsibility for grave abuses are important steps on the path of rendering justice. However, they cannot be considered a mere substitute for restitutional measures and compensatory schemes. Further, any margins or latitudes in shaping reparative policies and programmes may never ignore the principles of non-discrimination and non-exclusion.

In situations where gross and massive violations of human rights have occurred or are occurring, often amounting to serious crimes under international law, adequate and effective reparation may well imply and require a resort to collective redress and collective means of reparation.³² The term “collective” applies to reparative measures and types of goods and services made available by way of reparations aiming at a victimised group or community as the beneficiary. Symbolic reparations, such as public apology and setting up memorials, are also collective reparations by way of satisfaction. And the provision of material goods and services so as to restore decent living conditions, and to secure health and educational facilities, may serve as a mode of collective reparations for the benefit of victimised groups or communities. However, this collective approach is not without hazards. Thus, what is being offered by way of reparation, for instance basic social services, is to be provided anyway to all persons as an entitlement under general human rights law. Reparations are a means to achieve justice for the benefit of individual and collective victims by offering redress for harm done, but they are no substitute for meeting targets that are pursued on other grounds. This also poses the question of the relationship between reparation programmes and development programmes.³³ Both what are considered “developing” and “developed” countries may prefer for expeditious policy reasons to avoid honouring obligations arising from the duty to afford reparations. “Developing” countries facing demands for

³¹ Office of the United Nations High Commissioner for Human Rights (2008) Rule-of-Law Tools for Post-Conflict States, Reparations Programmes, HR/PUB/08/1, New York/Geneva, p. 23.

³² Letschert and van Boven 2011, pp. 153, 169–173.

³³ Ibid., pp. 153, 177, 178.

reparations are often inclined to argue that development *is* reparation. Similarly, “developed” countries that are called upon to repair historical wrongs, may argue that compensatory measures are not appropriate means for redressing historical injustice, but that instead greater development efforts are needed to achieve a more just and equitable distribution of wealth and resources, in particular vis-à-vis disadvantaged, deprived and systematically injured groups. It is indeed enticing to make a shift from reparation to development. It avoids complex and agonising issues of accountability as well as troublesome classifications of people, as victims and as perpetrators. Such expeditious policy considerations appear to be attractive but fail to recognise the essential notion of reparation as constituting part of a process towards peace, justice and reconciliation. They also tend to loose sight of a victim-oriented perspective that keeps faith with the plight of victims and survivors.

2.4 Concluding Remarks

For long the plight of victims has been overlooked. Most victims have been suffering in anonymity. Their numbers are running into the thousands and millions in all continents. The Rome Statute of the International Criminal Court recalls in its preamble that during the last century millions of children, women and men have been made victims of unimaginable atrocities that deeply shock the conscience of humanity.³⁴ Deliberate and non-deliberate ignorance, neglect, denial, refusal to acknowledge, impunity, disrespect are components of patterns of injustice and inhumanity. But there are also counter forces at work. In the foregoing, I have tried to identify some positive trends in awareness building and in law. In doing so I was mindful of all the odds, the dilemmas and the deficiencies connected with rendering justice to victims and all the vulnerable. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation as well as the Impunity Principles have been shaped as new tools for victim-oriented policies and practices, setting out a range of modalities of reparation in the overall context of the right to truth and the prescriptions of retributive and restorative justice. Forward-looking policies should not ignore what happened in the past so as to see to it that the wrongs of the past will not be repeated. Therefore, squarely facing the past, opening up the truth, repairing harm done, restoring and upholding the rule of law must be a standing assignment in the implementation of the global agenda of peace and justice.

³⁴ ICC Statute, Preamble, para 2.

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