
REPARATIONS FOR VICTIMS AS A KEY ELEMENT OF TRANSITIONAL JUSTICE IN THE MIDDLE EAST OCCUPIED TERRITORIES: A LEGAL AND INSTITUTIONAL APPROACH

FERNANDO VAL-GARIJO^{*}

1. INTRODUCTION

Victims of human rights violations are entitled to obtain adequate and effective reparation, that is, reparation which is proportional to the harm they have suffered, as is being increasingly recognized in relevant international law instruments. Justice for victims is crucial for achieving a lasting solution to any conflict. In this respect, transitional justice, understood as a systematic response to widespread human rights violations and international humanitarian law violations derived from a protracted, violent conflict, must

^{*} Assistant Professor, Public International Law, School of Law, UNED (National University of Distance Learning), Madrid, Spain. fval@der.uned.es

include a reparations scheme. Only if victims are materially and morally repaired can communities achieve durable peace, justice and reconciliation, and put behind them the conflicts that have been disrupting them for years or even generations. There is a growing awareness of the need to design transitional justice initiatives and programmes that include reparation to victims as a prominent feature and to implement such programmes with the participation of the victims themselves⁽¹⁾. Recent international developments concerning the right to reparation and the forms thereof offer an opportunity to rethink solutions to the Middle East conflict in the Occupied Territories that include much needed victim-oriented measures.

2. A PREMISE: THE RIGHT OF VICTIMS TO OBTAIN REPARATION.

The foundations of the right to reparation of victims in international law can be traced to several human rights instruments, universal and regional in scope, and to the case-law and jurisprudence of the courts and organs that interpret and apply the provisions enshrined in such instruments⁽²⁾. The International Covenant on Civil and Political Rights, for instance, requires explicit reparation in the form of compensation for victims of violations of article 9.5 (unlawful arrest or detention) and article 14.6 (miscarriage of justice). It could be argued that this explicit recognition is circumscribed to two specific rights, but the Human Rights Committee, in its General Comment No. 31, has made it clear that the obligation to make reparation to individuals whose Covenant rights have been violated is general, both with respect to the rights violated and to the forms of reparation. The Human Rights Committee, confronted with the issue of determining the content and meaning of article 2.3 of the Covenant (right to an effective remedy), understood that in addition to the explicit compensation required by articles 9.5 and 14.6, “the Covenant generally entails appropriate compensation”. It also noted that, where appropriate, in addition to compensation, “reparation

can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations”⁽³⁾. It is also significant for the purposes of this paper that General Comment No 31 refers to the issue of how the Covenant and international humanitarian law relate. It is the Human Rights Committee’s view that “the Covenant applies also in situations of armed conflict to which the rules of humanitarian law are applicable”. Both bodies of law are “complementary, not mutually exclusive”, which means that, in the specific situation of armed conflict, “more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights”⁽⁴⁾.

Also relevant to the foundations of the right to reparation is article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 14 establishes the obligation of each State party to the Convention- and the corresponding right of every individual- to ensure that its legal system provides for the redress of victims of torture, which must have an enforceable right to fair and adequate compensation, including rehabilitation as full as possible.

In at least two regional systems, the right to obtain reparation for human rights violations is well established. Article 41 of the European Convention of Human Rights and Article 63.1 of the American Convention of Human Rights provide for this right of individuals that have been victims of violations of the rights protected by these international treaties. Both the European Court of Human Rights and the Inter-American Court of Human Rights have, in their respective case-law, defined the content and scope of the duty of States to repair the victims of violations of which they can be held responsible. The duty of States to repair and redress is the other side of the individual right to an effective reparation, proportional to the damage suffered, in case a human rights violation is committed.

The right of victims of human rights violations to obtain adequate

reparation is a key element of universal and regional systems of human rights protection. It is true that this right is not always explicitly proclaimed in international human rights instruments as an individual right, for those instruments rather enshrine the duty of States Parties to make reparation for violation of protected rights. However, I contend that such duty is but the other side of a legal relation involving the violating party and the injured parties or victims, who will ultimately be individuals. Such individuals, then, have the right to obtain the reparation owed by the violating party, an assertion rooted in a general principle of law, according to which the violation of a legal rule or provision that causes damage gives rise to the duty to repair. Since this principle is a *general* principle of law, it informs international law as a whole, which means that the principle can be invoked and applied in all of its sectors or branches, such as international human rights law. Its interpretation and enforcement, however, may and does vary depending on the branch of international law and its degree of recognition, promotion and protection of the rights of individuals.

The general principle establishing the duty of law violators to repair the harm they have caused can be said to apply also in international humanitarian law. In this body of international law the principle can be found in certain treaty provisions, such as article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land. According to this provision, a belligerent party which violates the rules governing the conduct of war on land shall, if the case demands, be liable to pay compensation. The same provision can be found in article 91 of the 1977 Protocol Additional to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (Protocol 1)⁽⁵⁾. As for non-international armed conflicts, there are no explicit treaty rules providing for reparation and compensation of victims of violations of the law applicable to such conflict. Nevertheless, the duty to repair can be said to emerge from the violation of common article 3 of the four 1949 Geneva Conventions or from the violation of other provisions of the 1977 Protocol Additional 2.

International responsibility for the violation of any of these provisions emerges for both States and non-State actors, a responsibility that must materialize in repairing the damage inflicted to the victims of such violations.

It is clear that the Parties to a conflict have the duty to make reparation in case of a violation of the law of armed that inflicts harm on individuals. The question now is to know whether the right to obtain reparation belongs only to States and other international actors or to individuals as well. In this respect, influential scholars uphold the view that the rule contained in article 3 of the 1907 Hague Convention and in article 91 of the 1977 Protocol Additional 1 establishes a right not limited to States, that is, a right for individuals to obtain compensation. It has been pointed out that the use of the term *compensation* in article 91- instead of a more generic one such as reparation- is an indication that this provision refers to individuals as its beneficiaries⁽⁶⁾. The International Committee of the Red Cross, in its Commentary to article 91, also identifies individuals as entitled to compensation, along with States⁽⁷⁾. Other scholarly opinions can be cited in support of a similar interpretation of article 3 of the 1907 Hague Convention⁽⁸⁾. The right of victims to reparations is also enshrined in article 75 of the Rome Statute of the International Criminal Court.

Therefore, the right of victims to reparations for damage caused by violations of international humanitarian law exists, but has materialized in a heterogeneous, selective and partial fashion. Heterogeneous, because the institutional frameworks allowing to claim this right have been as diverse as International Claims Commissions⁽⁹⁾, International Criminal Courts and, in indirect ways, international human rights protection systems. Selective, due to the fact that such legal possibilities have only existed with respect to certain conflicts, not with respect to conflicts in general. Finally, the right of victims to obtain reparations has materialized only partially, because the procedural dimension of this right (the so-called right to an effective remedy) has been largely neglected, to such an extent that it could almost be

labelled as a right without remedies, something many a jurist would no doubt consider a contradiction in terms.

It is my view, however, that these provisions and mechanisms embody a principle which is applicable to every conflict involving widespread violations of human rights law and international humanitarian law, a general principle that is gradually materializing as a set of international customary rules which apply in various ways in different conflicts, and which turn on the right of individual victims of such violations to obtain reparation. An example of this can be found in the recent practice of the International Court of Justice, In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court understood that Israel has the obligation to make reparation for the damage caused to “all natural or legal persons concerned”⁽¹⁰⁾. The Court then identified restitution and compensation as the appropriate forms of reparation in the case⁽¹¹⁾. This advisory opinion, though leaving many issues concerning reparations unanswered, is certainly a most valuable contribution to establishing the right of individuals to reparations in international law.

A further observation is required at this point. So far I have argued in favour of the individual right to reparation for violations of human rights law and international humanitarian law, and the individual victim is and remains the basis of my approach to victimology and the legal problems associated with this discipline. Nevertheless, when a conflict involves widespread violations of human rights and produces a large number of victims, their collective dimension gains importance. Victims, then, must also be considered as a group, and even as a number of groups within the general group of victims of a conflict. Only focusing on their existence as a whole, on the collective dimension of the victims of a conflict can certain aspects of victimhood be addressed, certain wounds healed and certain harm repaired. Moreover, in long, protracted conflicts that extend over generations, communities as a whole tend to be victimized, and some basic aspects of community life- collective memory, shared identity and vision of the future,

not to mention economic growth, prosperity expectations, or cultural development – are damaged, reduced or altered. Collective forms of reparation are then needed to help groups of victims and communities as a whole move forward.

3. A SYSTEMATIC FRAMEWORK FOR VICTIM-ORIENTED REPARATION INITIATIVES

Under international law, gross violations of human rights and international humanitarian law give rise to the right of victims to reparation, and its corresponding duty for States and other actors liable for the harm suffered to make such reparation. It is typical of international law to establish these correlated right and duty very broadly and leave States and other entities free to define and implement actual reparation schemes. In such a context, both international and domestic law and policy become crucial. Any victim-oriented reparations programme can use the valuable framework provided by 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*, contained in a Resolution adopted by the United Nations General Assembly on 16 December 2005⁽¹²⁾ (hereafter, the Basic Principles and Guidelines). The value of these Basic Principles and Guidelines lies in their systematic approach to the problem of reparations. They are to function as a reliable parameter for establishing reparation programmes, containing existing international legal obligation and indicating means to comply with them. As the Office of the United Nations High Commissioner for Human Rights has rightly observed, “the Basic Principles and Guidelines are to serve as a source of inspiration, as an incentive, and as a tool for victim-oriented policies and practices”⁽¹³⁾.

Among the many interesting aspects of the Basic Principles and Guidelines, one could underline the fact that it provides a definition of the

term “victim”, giving a broad concept of this much debated notion. According to the UN General Assembly “victims are persons who individually and 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”. Echoing the distinction between direct and indirect victims, the Basic Principles and Guidelines then affirm that “where appropriate, (...), 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”⁽¹⁴⁾.

Another prominent feature of the Basic Principles and Guidelines is that they take into consideration the right to reparation in its two dimensions, substantial and procedural. When considering the remedies that must be available to victims, the General Assembly Resolution affirms that victims have the right to: a) equal and effective access to justice; b) adequate, effective and prompt reparation for the harm suffered; and c) access to relevant information concerning violations and reparations mechanisms⁽¹⁵⁾. Access to justice- the procedural dimension of the right to reparation- means that victims shall have equal access to *an effective judicial remedy as provided for under international law*, which in practice means access to fair and impartial judicial proceedings⁽¹⁶⁾. Recognizing the individual and collective dimensions of victimhood in cases of gross violations of human rights and serious violations of international humanitarian law, States are encouraged to develop procedures to allow groups of victims to present claims for reparation and to receive reparation⁽¹⁷⁾.

The substantial aspects of the right to reparation are treated with great clarity in the Basic Principles and Guidelines. As a general rule, they recall that reparation should be proportional to the harm suffered. They then lay out the principles governing full and effective reparation, which in the case of gross violations of human rights and serious violations of international

humanitarian law includes five basic forms of reparation activities: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution is intended, whenever possible, to “restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred”⁽¹⁸⁾. It may include measures such as restoration of liberty, enjoyment of human rights, identity, return to one’s place of residence, restoration of employment and return of property.

Compensation is meant to cover any economically assessable damage, such as physical or mental harm, lost opportunities (employment, education and social benefits), material damages and loss of earnings, moral damage and costs required for legal assistance, medical services and psychological and social services.

Rehabilitation should include “medical and psychological care as well as legal and social services”⁽¹⁹⁾.

Satisfaction is a form of reparation that seeks to redress some general and long-term aspects of the harm caused to victims of the gravest violations of human dignity. Satisfaction focuses on emotional and psychic needs of the victims and it has a public dimension which extends the effects of reparation beyond victims to the larger community they are part of. This form of reparation may include a variety of measures ranging, in the Basic Principles and Guidelines, from cessation of continuing violations, truth-seeking policies and truth-disclosing measures, search for the disappeared and the bodies of those killed for the purpose of reburial, public apologies, judicial and administrative sanctions against persons liable for the violations, commemorations and tributes to victims and inclusion of a historical record of the violations occurred in human rights and international humanitarian law training and in educational materials.

Finally, *guarantees of non-repetition* are another form of reparation that may include measures that are very broad in scope. The purpose of

guarantees of non-repetition goes beyond the reparation of victims to the prevention of future violations, in order to preserve communities from the horrors entailed in gross violations of human rights and serious violations of international humanitarian law. They are structural in nature and their effectiveness is to be assessed in the long run. Guarantees of non-repetition materialize in measures such as ensuring civilian control of military and security forces, ensuring the implementation of international standards of due process, fairness and impartiality in proceedings, strengthening the independence of the judiciary, the protection of legal, medical and media professionals and human rights defenders, providing human rights and international humanitarian law training to military and security forces and to society in general, promoting international human rights standards in public service, law enforcement, the media, social service and among military personnel, promoting mechanisms for conflict-resolution and reviewing and reforming the law when necessary. These measures, listed in more detail in the Basic Principles and Guidelines, indicate that guarantees of non-repetition conform a policy of reparation-prevention that sees the community of victims as a fulcrum to transform and reshape public power and society as a whole, to the point where no more widespread, systematic and hideous attacks on human dignity are possible or even conceivable.

4. RELEVANCE OF THE REPARATION PRINCIPLES TO THE MIDDLE EAST CONFLICT IN THE OCCUPIED TERRITORIES

Given the grim realities of the Arab-Israeli conflict, a special concern for the individuals that have been victimized will be needed if the communities at the center of the conflict, Palestinians and Israelis, are to reach a lasting solution and embrace peaceful coexistence and cooperation. This Middle East conflict has so far produced mass victimization affecting both sides. A long, protracted struggle has taken place between Israel, on the one hand, and the Palestinian community and several Arab and Muslim States, on the

other. Gross violations of human rights law and serious violations of international humanitarian law have occurred. In the latest phase of the conflict, according to most experts, the most intense and widespread suffering for victims has been caused by terrorism, which has included suicide bombings as an extreme form of terrorist act against Israelis, and by the use of force in violation of the law of armed conflict by Israel and armed groups such as Hamas and Hezbollah and others⁽²⁰⁾. A true solution to the conflict, apart from dealing with its political aspects, cannot neglect its victims, for they are those who carry the deepest wounds that need to be healed. In this respect, the framework provided by the Basic Principles and Guidelines is an inspirational, if ambitious, starting point for the design of redress policies and reparation programmes.

A comprehensive, far-reaching reparation initiative for the Occupied Territories of the Middle East must be based on the premise of a previous peace agreement. In the foreseeable future, such an agreement would be likely to come, if at all, through an International Peace Conference in which participation of Middle East States and other States must be wide, so that a positive outcome can be regarded as the beneficial product of the international community involvement and support. The main result of the International Peace Conference would be a peace treaty in which the core issues of the conflict between Israel and Palestine are addressed and resolved, including issues such as international borders, security, territorial disputes and access to natural resources, Palestinian refugees or Israeli settlements, among others. Prior to the adoption of the peace treaty, a Palestinian State would be created and recognized by as many States and international actors as possible. The right of Israel to exist as a sovereign State within the agreed borders would be reaffirmed as unquestionable.

After peace, justice and reparation must come. A fundamental decision would have to be adopted as to the moment from which reparation would have to be made, with 1967 as a possible starting point and earlier dates such as 1948 worthy of serious consideration. In the political context created by

these premises, transitional justice initiatives would be required to bring about deeper changes in the very fabric of the communities involved. Ideally, those transitional justice initiatives would have to be a product of the International Peace Conference and could include retributive and restorative activities. Among the former, two unavoidable measures are the conduct of independent investigations of the most egregious violations of human rights and international humanitarian law and the imposition of sanctions and penalties on those most responsible for such violations. This could be achieved by domestic courts, whose independence must be ensured or reinforced, or by the combined efforts of domestic courts and an international or internationalized special court, should such a jurisdiction be deemed worthy of creation. As for restorative measures, the creation of a Truth and Reconciliation Commission could be envisaged, whose main task would be to establish a historical record of the gravest violations with the direct participation of the victims- and, if possible, the perpetrators-themselves.

In any transitional justice scheme designed to help Palestinian and Israelis move from conflict to peace and on to cooperation, victimized individuals must have the opportunity to enforce their specific rights as victims. This, in turn, implies that they must have access to justice through effective judicial remedies. A legal channel should in any case be open for victims to obtain compensation and, when possible, restitution for the harm suffered before domestic courts or, eventually, before an international or internationalized special court, or even before a hypothetical Israel-Palestine Claims Commission that could be created by the International Peace Conference. Other forms of reparation, such as rehabilitation, satisfaction or guarantees of non-repetition, would be best implemented with the support of a Trust Fund for Victims of the Palestinian-Israeli Conflict. The underlying idea of the aforementioned transitional justice mechanisms is the complementarity among justice measures, which will intend to lay the foundations of a new reality of peace and reconciliation for Palestinians and

Israelis through the search for truth and the implementation of justice, retributive, preventive and reparative.

5. A TRUST FUND FOR VICTIMS OF THE PALESTINIAN-ISRAELI CONFLICT

Once the peace settlement is reached, Israel and Palestine should create a Trust Fund for the benefit of victims of the most serious violations of human rights law and international humanitarian law related to the Palestinian-Israeli conflict. The Trust Fund would be created through an international treaty between these two States, as a means to ensure their commitment to the reparation of victims. The Trust Fund would be an institution having such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. Apart from creating the Trust Fund, the international treaty signed by Israel and Palestine would establish a general obligation for both States to cooperate with it in its activities in favour of victims.

It is important to grasp that, in principle, it would not be the Trust Fund's sole or main task to design a grand and overall reparation scheme that would address all victims and all reparation issues, and that would fall upon victims "from above". The Trust Fund would be open to fund reparation initiatives made by the victims themselves. The rationale behind this option is to consider victims as active partners in the reparation process and to provide the means for victims to help themselves. This view of the reparation process from its grass-roots is likely to cater to the most pressing needs of victims, since victims themselves, with due legal and technical assistance, would be requesting support for specific reparation projects. The Trust Fund would thus be engaging victims in their own terms. This system of open tenders is also a means for victims to actively participate in the reparation process and, as a result, come out empowered. It would use local leadership and would promote ownership of the reparation activities. In

addition to this, the Trust Fund would directly design and implement reparation programmes when it detects that basic or urgent aspects of the reparation process are not being covered by the open tender mechanism. The activity of the Trust Fund is thus likely to consist in a combination of victims-requested projects and Trust Fund-designed initiatives.

I will now deal with other issues related to the Trust Fund for Victims, such as its possible organic structure and management, its funding, its activities and its link with jurisdictional systems. What follows is a mere outline that is not intended to provide detailed answers to every question raised by the operation of the Trust Fund.

5.1) STRUCTURE

The Trust Fund would be presided by a three-member Board of Directors, one appointed by Israel, one by Palestine and another by consensus between both States. Members of the Board could have any nationality provided all three are nationals of different States. They would be chosen from among persons of high moral character and each member would serve the Board in an individual capacity and *pro bono*. The Board of Directors would provide the basic guidelines and oversight of the activity of the Trust Fund. The Board would try to reach its decision by consensus or, if consensus is not possible after every effort has been made, by an absolute majority. It would appoint an Executive Director charged with the conduct of daily affairs. The Board of Directors would meet at least twice a year in regular session and would report to Israel and Palestine. Its reports and decisions would be made public. A Secretariat would be established to assist the Board of Directors in the performance of its tasks⁽²¹⁾.

5.2) FUNDING

The Trust Fund would be funded by voluntary contributions from States, International Organizations, private corporations and other entities. In addition to this, Israel and Palestine would make an annual contribution to

the Trust Fund that would allow for its daily functioning, and would fund some reparation projects⁽²²⁾. A special dedicated line would have to be introduced in the national budget of both States. It would be the task of the Board of Directors to make an annual appeal for voluntary contributions, and to establish contacts with possible donors to secure the receipt of funds. The Board would also ensure that all contributions are consistent with the purposes of the Trust Fund and that no contributions affect its independence.

In order to encourage the donation of funds, contributions could be earmarked within certain limits. Voluntary contributions from States should not be earmarked. Contributions from International Organizations could be earmarked up to one half of the contribution, if earmarking appears to be consistent with the purposes of the Organization. Private donors could earmark their contributions for up to one half of the contribution for a Trust Fund project or activity, as long as the allocation requested by the donor is not discriminatory for victims on grounds of race, sex, language, religion, political affiliation, ethnic or other origin, or nationality. Earmarking in favour of groups enjoying specific protection under international law, such as children or refugees, should not be considered to be discriminatory. The Board of Directors would be vigilant that available funds are equitably distributed among the different groups of victims.

5.3) REPARATION ACTIVITIES

The Trust Fund for Victims of the Palestinian-Israeli Conflict would model its reparation activities on 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. Using the Basic Principles and Guidelines as a source of inspiration seems adequate because, during this Middle East conflict, some of the most dreadful attacks on human dignity have taken place in the form of terrorism, and some of the most widespread violations of fundamental rights have been caused by the unlawful use of armed force. The plight of the victims of this

conflict derives from the fact that human rights law and international humanitarian law have been massively violated. The activities funded by the Trust Fund would form a combination of material and symbolic reparations and, from a different point of view, a combination of individual and collective reparations. A broad variety of reparation activities will be needed to reach as many victims as possible, bearing in mind that victims of different categories of violations will need different kinds of benefits.

In principle, restitution and compensation would not be among the preferred reparation forms practised or funded by the Trust Fund. The reason is that these basic forms of reparation are to be awarded by those directly responsible for the violations, whether individuals that have been convicted in a criminal trial or States and other entities that have accepted such responsibility⁽²³⁾ or have otherwise been declared responsible of violations of international law. Any State liable to pay compensation can choose to meet this obligation on a case-by-case basis or through a domestic compensation programme. Issuing restitution orders would be beyond the powers of the Trust Fund. However, the Trust Fund should not be precluded from awarding compensations. In cases where the chance for victims to obtain due compensation is entirely absent, the Trust Fund could step in to ensure that victims see their material and moral damage somehow repaired. Let us, for the sake of exemplifying, imagine that an individual is convicted of a war crime or a crime against humanity by a domestic or an international court and is also sentenced to pay a large sum to his many victims. The convicted individual is subsequently found to be indigent and cannot comply with the compensation order issued by the court. Moreover, for some legal reason his acts can in no way be attributed to a State that would be liable to pay compensation as a matter of subsidiary responsibility. Victims should then have the possibility of receiving compensation from the Trust Fund, which would not be legally bound by the judicial decision, but would be faced with a strong moral obligation to facilitate compensation. A momentous decision would have to be made as to the legal effect of accepting the benefits of a

Trust Fund compensation programme, that is, as to whether the Trust Fund compensation programmes are final or not. A final programme is one that precludes the possibility for victims to pursue compensation through the judicial system once they have accepted compensation by other institutions. Such a decision would have to be made in the international treaty creating the Trust Fund, for it could not be taken by the Fund itself or by Israel or Palestine unilaterally. In my view, accepting a compensation payment by the Trust Fund should not always have the legal effect of closing all other paths for civil redress for victims of gross human rights violations and serious violations of international humanitarian law that constitute crimes under international law, especially when victims have resorted to the Trust Fund because convicted perpetrators have been found to be indigent. In these cases, it could be argued, compensation paid to victims would be normally less than that they would have obtained through court litigation. Just as statutes of limitations do not apply to this type of international crimes, the reparation duties derived from the commission of such crimes could be said to be equally unaffected by statutes of limitations. Therefore, victims should be entitled to obtain other compensation payments from the convicted individual if, for instance, unknown financial assets belonging to him are found. At any rate, decisions on the tasks the Trust Fund is to perform concerning compensation, and the legal effects of its decisions on this issue, should be influenced by careful consideration of domestic compensation laws of the States involved, and of the paths open to victims in domestic legislation for civil litigation. And in principle, victims that have benefited from a domestic non-judicial compensation programme should not be entitled to obtain benefits for the same harm from the Trust Fund.

Whenever compensations are paid, pensions are preferable to lump sums as the modality of distribution, since they are less likely to be misspent⁽²⁴⁾ and the very regularity of pensions tends to create in victims a sense of ownership of the reparation process and makes it easier for them to trust the institutions born of the reparation process. However, adopting a

pension system is not devoid of risks and uncertainties for the reparation process, especially for an institution like the Trust Fund, and would definitely test the goodwill and commitment of donors. Regular pensions would require regular donors over an extended period of time, a real challenge when contributions are voluntary

The Trust Fund would be expected to make rehabilitation of victims one of its principal tasks. It would fund and support projects aimed at providing medical services to victims, since medical and psychological rehabilitation will be an essential part of the reparation owed to victims. Violent conflicts, such as the Arab-Israeli conflict, cause a high incidence of trauma. A focus on mental health and psychological counselling will be needed. Existing medical services will not be likely to satisfy the specific needs of victims and specialized trauma care should be provided. Apart from psychological rehabilitation, various physical health care projects would be required, since the victims of a protracted, violent conflict tend to be prone to disease. Medical services providers should be trained to act in the awareness that victims of human rights violations and international humanitarian law violations have special needs as victims and such training programs should also be financially supported by the Trust Fund. Joint Israeli-Palestinian medical projects should be encouraged. The building of medical infrastructure should also be considered as part of the rehabilitation activities supported by the Trust Fund.

In addition to medical and psychological rehabilitation, the Trust Fund should lay particular emphasis on the social rehabilitation of victims. Medical care and social services play a complementary role in rehabilitation, for helping individuals to overcome challenges derived from physical injuries or psychological harm puts them in a better position to start or resume their role as contributive members of society. Therefore, the Trust Fund should devote a considerable proportion of its resources to projects aimed at the education of victims, benefiting young victims in particular. Other social rehabilitation projects would be designed to increase the

professional skills of victims. This rehabilitation policy is based on the reality of lost opportunities derived from the conflict: violence, poverty, discrimination, life in refugee camps, physical injury or psychological harm have been suffered by many at ages when their lives could, and normally would, have been devoted to basic/high education or professional training. Offering these victims education and skills-improving opportunities helps them build or rebuild their lives. It is thus an essential part of the reparation process, and one that could yield very positive results for the communities to which the rehabilitated victims belong. Social rehabilitation programs give also the opportunity to provide valuable collective reparations in the form of infrastructure for education and professional training that can be used for generations. Finally, legal counseling projects would also have their place among rehabilitation activities.

Among the satisfaction measures that could be supported by the Trust Fund are projects aimed at establishing a historical record of violations committed during the Arab-Israeli conflict. Truth-seeking initiatives could be the basis of later projects of inclusion of accounts of violations in educational materials and human rights law and international humanitarian law courses and training programs. The Trust Fund would also fund and take part in commemorations and tributes to the different groups of victims or to victims as a whole. It would favour satisfaction initiatives that originate or involve victims from both the Palestinian and Israeli communities. Building a common museum or memorial site would be the type of project that could satisfy some pressing reparation needs of the victims of this conflict. It would be a satisfaction measure, both collective and symbolic, whose importance for the reparation process should not be underestimated. A museum or a memorial site is, in principle, a reality heavy with meaning that can foster the emergence of a common memory that helps victims make sense of their suffering. Making the memory of victims a public matter is an inter-generational tribute to them and a mechanism of social prevention: communities that remember are not likely to repeat the errors of the past.

Satisfaction measures aimed at paying tribute to the memory of victims are a link to the last form of reparation, guarantees of non-repatriation. Measures falling into this category are generally to be adopted by States and therefore lie beyond the reach of the activity of an institution like the Trust Fund. Most of them are the product of legislation or of government decisions. However, depending on the level of donations, the outcome of other programmes and the priorities of the hour, the Trust Fund could participate in the funding of training activities in human rights law and international humanitarian law for law enforcement officials, civil servants, military or security personnel and other sectors of society.

6. CONCLUSION

An institution like the Trust Fund for Victims of the Palestinian Israeli Conflict is but one possible element of a broader transitional justice design that could be implemented in the area once a peace agreement is reached. This purpose of this paper has been to outline some of the basic features that such an institution would have and to foresee some of the main challenges it would face. Being a mere part of a wider scheme, some of its traits would no doubt vary depending on whether, and which, other transitional justice initiatives, domestic and international, are adopted. For instance, in a context where a Truth Commission or a Special Criminal Court- whether international or internationalized- operate, the link between such institutions and the Trust Fund would have to be carefully determined. If an array of transitional justice initiatives is to be implemented, a previous overall design would be needed, so as to avoid inefficiencies and double efforts.

The Trust Fund for Victims, as envisaged in this paper, is to function as a catalyst in the reparation process. Rather than being the sole actor in designing and implementing reparation initiatives, it is to act as a channel through which reparation projects coming from the victims themselves are made possible. It would thus have to work closely with local actors and

develop partnerships with local cooperation agents, and make use of redress and goodwill initiatives already in operation⁽²⁵⁾. It should also take the initiative and supplement the reparation process if serious reparations deficiencies are detected. Its main concern would be with rehabilitation and satisfaction initiatives, leaving the burden of restitution and compensation to domestic programmes and, eventually, criminal prosecution and court litigation. Thus unburdened, the Trust Fund would be in a good position to satisfy the reparation needs of victims in these two areas. Although rehabilitation and satisfaction are part of the content of the right of victims to reparation, they can also be forms of reparation that are more difficult to enforce in a satisfactory manner against States or individuals. Therefore these victims' needs will be best served by an institution that is largely free of the duty of paying compensation. It is in my view crucial not to neglect rehabilitation and satisfaction measures in a reparation process, because these forms of redress help victims rebuild their lives and find meaning in the suffering they have endured and, in many cases, still do.

A peace treaty between Israel and the future State of Palestine would be an invaluable contribution to peaceful international relations and a breakthrough in the tangled politics of the Middle East. But peace in political, intergovernmental terms can be only the starting point of a process leading to cooperation and reconciliation between human communities. Peace without justice is a fragile settlement, a mere candle in the wind that can be easily blown out by warmongers or irrational forces. Justice, on the other hand, requires the reparation of victims whose basic rights and human dignity have been violated. Only when such victims are redressed can a new future begin for Israel and Palestine. ❖

NOTES:

1. See *Rule-of-Law Tools for Post-Conflict States. Reparations Programmes*, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2008, p. 2.

2. For a general introduction to the issue of reparations in international law, see FALK, R.: “Reparations, International Law, and Global Justice: a New frontier”, *The Handbook of Reparations* (edited by PABLO DE GREIFF), Oxford University Press, 2006, p. 478-503.

3. *General Comment No 31 (80) Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, at 16.

4. *Ibid.*, at 11.

5. ZEGVELD notes that the text of article 91 was adopted without disagreement and with little discussion, a fact suggesting that this provision expresses a well established rule of international customary law. See ZEGVELD, L.: “Remedies for victims of violations of international humanitarian law”, *International Review of the Red Cross*, September 2003, Vol. 85, No. 851, p. 506, foot note 32.

6. See ZEGVELD, *op. cit.*, p. 827-828, citing KALSHOVEN’s stance on the issue.

7. <http://www.icrc.org>, International Humanitarian Law-Treaties & Documents, 1949 Conventions & Additional Protocols & their Commentaries, Commentary to Article 91, at 3656-3657.

8. KALSHOVEN, DAVID and GREENWOOD have upheld this view. See “Expert Opinion by Professor Frits Kalshoven , Article 13 of the Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907”, “Expert Opinion by Professor Eric David, The direct effect of Article 3 of the Fourth Hague Convention of 18th October 1907 respecting the Laws and Customs of War on Land”, “Expert Opinion by Professor Christopher Greenwood, Rights to compensation of former prisoners of war and civilian internees under Article 3 of The Hague Convention No. IV, 1907”, FUJITA, H., SUZUKI, I. & NAGANO, K. (eds.): *War and the Rights of Individuals: Renaissance of Individual Compensation*, Nippon Hyoron-sha, Tokyo, 1999, cited by GILLARD, E-C.: “Reparations for violations of international humanitarian law”, *International Review of the*

Red Cross, September 2003, Vol. 85, No. 851, p. 536, at 18.

9. Examples of these institutions are the United Nations Compensation Commission (UNCC), created in 1991 as a subsidiary organ of the Un Security Council, whose mandate is to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait, and the Eritrea-Ethiopia Claims Commission established pursuant to Article 5 of the 2000 Agreement between Eritrea and Ethiopia, which decides through binding arbitration all claims for loss, damage or injury by one Government against the other and by nationals of one party against the Government of the other party. For further information, see <http://www.uncc.ch> and <http://www.pca-cpa.org>.

10. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, 9 July 2004, at 152.

11. *Ibid.*, at 153.,

12. A/RES/60/147, 21 March 2006.

13. *Rule-of-Law Tools for Post-Conflict States*, p. 7, cited at 1.

14. A/RES/60/147, at 8.

15. *Ibid.*, at 11.

16. *Ibid.*, at 12.

17. *Ibid.*, at 13.

18. *Ibid.*, at 19.

19. *Ibid.*, at 21.

20. See, for instance, A/HRC/12/48, 25 September 2009, *Report of the United Nations Fact-Finding Mission in the Gaza Conflict*, also known as the Goldstone Report, which focuses on the situation in Gaza in connection with the military operations conducted between 27 December 2008 and 18 January 2009 and does not cover other situations and aspects of the conflict.

21. This structure is modelled on that of the Trust Fund for Victims of crimes within the jurisdiction of the International Criminal Court. See ICC-ASP/4/Res.3 Regulations on the Trust Fund for Victims, at <http://www.icc-cpi.int>.

22. The annual contribution by each of these two States would be the sole non-voluntary contribution to the Trust Fund. The contribution of each State need not be equal.

23. An example may help clarify the meaning and context of such acceptance. As has been indicated previously, the International Court of Justice, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, found that Israel has the obligation to make reparation to all natural and legal persons that have suffered any form of material damage as a result of the construction of the wall.

Following a request by the United Nations General Assembly, the Secretary-General proposed an institutional framework to establish a Register of Damage (see A/ES-10/361). Israel, as a matter of law and as a way of showing its commitment to the reparation process, should recognize the natural and legal persons included in that Register and pay compensation according to the estimated damage.

24. For a telling summary of the international experience that shows why pensions are likely to be better compensation tools than one-off payments, see *Rule-of-Law Tools for Post-Conflict States*, p. 31, cited at 1. This document argues that although lump sums maximize individual choice, sudden wealth often causes division among communities and families. A large lump sum may also place individuals- women, in particular- at the centre of demands for help that may rapidly consume the compensation payment.

25. For a quick overview of some initiatives aimed at fostering cooperation between Palestinians and Israelis see, GILBERT, M.: *The Routledge Atlas of the Arab-Israeli Conflict*, London and New York, Ninth Edition, 2008, p. 172-179, 197.