Prioritising Victims to Provide Reparations: Relevant Experiences

Briefing Paper No. 3 (2011)

By Paola Limón and Julia von Normann

Edited by Dr. Clara Sandoval

ETJN, Reparations Unit
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Reparations Unit, Briefing Paper No.3, Published in August 2011

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Foreword

It is with great pleasure that the Essex Transitional Justice Network (ETJN) of the University of Essex releases its first six briefing papers on reparations to the International Criminal Court. These briefing papers are the result of multiple talks held over the previous years with staff at the ICC, and specifically with the Victims Participation and Reparation Section (VPRS), about how to carry out its reparations mandate. These reports were possible thanks to the hard work of the staff team at the VPRS.

In the summer 2010, the VPRS of the ICC provided the ETJN with a list of questions on reparations, the answers to which would help the Court to better understand its possibilities and limitations in awarding reparations to victims of crimes under its jurisdiction. Drawing on the expertise in the area of reparations available at the University of Essex, specifically at the ETJN and its Reparations Unit, we endeavour to produce six briefing papers. The University of Essex supported this project as it awarded a Mini Knowledge Transfer Innovation Fund to publish and disseminate the papers.

Different members of the Reparations Unit of the ETJN, the majority of them students or former students of international human rights law at the University, were involved in the research and writing of these briefing papers. They were researched and written under the direction and guidance of Dr. Clara Sandoval, Director of the ETJN and of its Reparations Unit and Senior Lecturer at the School of Law. Different members of the ETJN were also instrumental in the preparation of these papers. In particular, Dr. Fabian Freyenhagen, Co-Convenor of the ETJN and Chair of the Normative Dimensions Unit; Professor Sabine Michalowski, member of the ETJN and Chair of the Economic Dimensions Unit; Diana Morales-Lourido, Programme Manager of the ETJN; and Sofie Johansen, Gil Surfleet and Rafael Charris, frontrunners of the ETJN. The ETJN expresses its gratitude to all of them. The views expressed in the briefing papers are not those of the International Criminal Court.

Each briefing paper complements the others so it is desirable to regard them as a whole. Nevertheless, each briefing paper could be read on its own. All papers are available as PDF files on the ETJN website and in printed version. The titles of the six briefings papers are:

**Briefing paper 1:** Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections (By Octavio Amezcua-Noriega)

**Briefing paper 2:** Collective Reparations and the International Criminal Court (By Sylvain Aubry and María Isabel Henao)

**Briefing paper 3:** Prioritising Victims to Provide Reparations: Relevant Experiences (By Paola Limón and Julia von Normann)

**Briefing paper 4:** The International Criminal Court and Reparations for Child Victims of Armed Conflict (By Evie Francq, Elena Birchall and Annick Pijnenburg)

**Briefing paper 5:** The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation (By Maria Suchkova)

**Briefing paper 6:** Adverse Consequences of Reparations (By Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel)

The VPRS provided us with the following questions: Is there any relevant jurisprudence of human rights courts or relevant experience from transitional justice mechanisms related to prioritising victims for the purposes of awarding reparations? If yes, what criteria did they
employ? And what were the reasons behind prioritisation? This briefing paper provides important insights into these questions.

For more information on the ETJN, please visit http://www.essex.ac.uk/tjn/

Clara Sandoval
Colchester, July 2011
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Prioritising Victims to Provide Reparations: Relevant Experiences

By Paola Limón¹ and Julia von Normann²

I. Introduction

1. This paper considers the prioritisation of beneficiaries for reparation purposes, taking into account the jurisprudence of international human rights courts and the experience of selected transitional justice mechanisms at the domestic level. The briefing examines how jurisprudence, selected reparations programs and transitional justice mechanisms have made use of prioritisation and which criteria have been decisive in their considerations.

II. Reparations Programs and Recommendations of Domestic Truth Commissions

2. The following section refers to exemplary reparations programs in order to show how these mechanisms have used prioritisation criteria when awarding reparations for grave breaches and/or gross human rights violations. It includes domestic administrative reparations programs from the Americas, Europe, Africa and Arabic States, Asia and Oceania and a global initiative for a sui generis case: the UN Compensation Commission. In several countries, where truth commissions have made recommendations that have not yet been implemented by the State, their suggestions for prioritisation will be analysed.

a. Americas

3. In the Americas, transitional justice mechanisms in Chile, Peru and Guatemala have all used prioritisation in different ways when recommending and/or awarding reparations.

i. Chile

4. After nearly two decades of military dictatorship, which produced massive human rights violations, Chile created a truth and reconciliation commission (TRC) (known as the Rettig Commission) mandated to produce a report on the most serious cases of human rights violations that took place.³

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5. From this mandate, stemmed the obligation to recommend reparation measures in the final report, which were later adopted as part of Law 19.123 of 1992, and which established a clearly prioritised list of beneficiaries of reparations of certain human rights violations. Those recognised as beneficiaries were members of the family unit of victims deceased as a result of disappearances or killings. The Law also established different forms of reparations to be awarded. For example, it recognised the right to a pension assigning distinct percentages of it to each of the immediate relatives: the surviving spouse (40%, pension for life); the mother or, in her absence, the father of the victim (30%, pension for life); the surviving unmarried partner of the victim’s out-of-wedlock children (15%, pension for life); and the victim’s children (equivalent of 15% each; until the last day of the year they turn 25 years of age, or for life if disabled).

6. Through Law 19.980 of 2004, the father of the victim was allowed to inherit the right previously received by the mother of the victim; and the percentage of the surviving unmarried partner of the victim’s out-of-wedlock children, was increased from 15% to 40% (to equal the amount given to a spouse), stemming from an initiative that considered it as a discriminatory measure. Regarding health benefits, these were extended to the father and siblings of the victim, in case they had not been considered beneficiaries for the purposes of the economic pension.

7. Also, since the early years of transition, Law 19.234 entered into force in order to grant pensions to those who had been dismissed from their jobs on political grounds. This Law was subsequently modified by Law 19.582, which established different amounts of pension benefits depending on the period of dismissal; and by Law 19.881, which established a new twelve-month period for people to register to receive these benefits.

8. The Rettig Commission was only mandated to deal with enforced disappearances and arbitrary killings; and it was not until 2003 that, through Supreme Decrees 1040 and

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5Ibid. Article 20.


7Ibid. Article 1(2)(d).


the Valech truth commission was created and received an extension of this mandate, in order to determine who had been victims of politically motivated torture and imprisonment, had survived and were entitled to reparations.

9. More recently, Law 20.405 was enacted and it created the National Institute for Human Rights in charge of keeping the records gathered by the Rettig and Valech Commissions, and the Human Rights Program. The law also ordered the creation of an advisory commission whose mandate was to reopen the determination process of victims.

**ii. Peru**

10. The Comisión de la Verdad y Reconciliación (CVR or TRC) in Peru identified different situations of vulnerability among the universe of beneficiaries of its reparations programme, which is why certain measures were to be put in place to ensure this vulnerability did not lead to a disadvantage in access to benefits in order to be able to give them a more comprehensive attention within the Program. Those considered to be among the groups of heightened vulnerability were older persons, orphans, widows and the disabled.

11. The TRC also established priority levels in granting compensation to the family members of the dead and disappeared. It recommended that the compensation should prioritise the surviving spouse or partner, over the children and the parents of the victim. It was to be distributed according to civil law on succession and customs of the claimant’s community (not less than 2/5 for the spouse or partner, not less than 2/5 for children, divided equally, and not less than 1/5 for parents, divided equally). It also allowed for the possibility of other family members or persons with special attachments to the deceased or disappeared to benefit from this compensation measure, as long as they proved their right as beneficiaries by demonstrating that their relationship with the victim was similar to a family link, considering the customs of the claimant's community. For the purposes of distribution, these family members are to be assimilated to a child of the victim.

12. The TRC’s collective reparations measures, though intended to benefit the totality of members of the communities affected, should grant preferential treatment to widows, orphans, older persons, and the disabled. It also recommended that differentiated quantities be distributed to different communities, taking into account the damage

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16Ibid. Transitory Article 3.


18Ibid, PP. 190-191.

suffered by the collective, the level of poverty of the zone, and the population size of the community.\textsuperscript{20}

13. The TRC also established that certain people be excluded from the reparations program, for example, people who had obtained reparations through other special policies, laws or decrees to attend to victims, or through actions in compliance with international judgments.\textsuperscript{21} In addition, while members of subversive organisations were excluded,\textsuperscript{22} members of the military were also considered beneficiaries unless they were covered by special legislation.\textsuperscript{23}

14. Also in the General Conclusions of the TRC’s Final Report, it expressed that given that the overwhelming majority of the victims were poor indigenous peasants, who had traditionally been discriminated against and excluded, they should receive preferential treatment by the State in its reparation measures.\textsuperscript{24}

\textbf{iii. Guatemala}

15. In Guatemala, structural poverty,\textsuperscript{25} injustice, racism and exclusion by institutions were determinant factors for the outburst and continuation of the conflict.\textsuperscript{26} Insurgency was the response to these diverse structural problems.\textsuperscript{27} And it was the military and civil defence counterinsurgent response sponsored by the State that led to open violence.

16. The Historical Clarification Commission (CEH or TRC) was created with a mandate to investigate the truth about the human rights violations during the armed conflict.\textsuperscript{28} In its recommendations for a reparations program, the CEH report suggested that in the cases where economic compensation was due, beneficiaries should be prioritised based on the severity of the violation, and the economic condition and social weakness of the beneficiaries; giving special attention to older persons, widows, minors, and those in a situation of abandonment.\textsuperscript{29}

\textsuperscript{21}Ibid. Articles 44, 52(b) and 52(f).
\textsuperscript{22}Regulations of Law 28.592. Supra, no. 23. Article 52(a).
\textsuperscript{23}Ibid. Article 52(c).
\textsuperscript{27}Ibid. Para. 17.
b) Europe

17. For Europe, reparations programs in the Former Soviet Union and Germany (after 1945) have been chosen as examples.

i. Former Soviet Union

18. In the Former Soviet Union, millions of people were killed, sent to Gulags or concentration camps and/or deported as members of ethnic groups. They suffered from political or religious repression or from expropriation. After Stalin’s death and from 1991, processes of de-Stalinisation took place. Victims of political repression have since benefited from Rehabilitation Laws in many succeeding States of the Soviet Union. Several examples will be presented.

19. In the Former Soviet Union, from 1956, victims of illegal imprisonment who had been officially rehabilitated could obtain a discretionary revision of their pension status and a one-off payment equal to their former salary for two months. They benefited from preferential treatment regarding housing but were rarely reinstated in their jobs. In case of death, the compensation could be claimed by those who were family members at the time of the violation. In the 1980s, several cities allowed former prisoners, purge victims and often their spouses to benefit from the privileges of World War II veterans, including priority access to housing, special food and medical care, and free local transport.

20. In the Former Czechoslovakia, the Bill of Juridical Rehabilitation of 25 June 1968 allowed until 1970 a revision of unlawful sentences or investigations. Those which had occurred between 1948 and 1957, were revised under the condition that they had a political motivation. Under articles 26 to 33, compensation could be obtained for expropriated goods, damage to health, income and for fines and costs of the trial proceedings. There was a maximum amount for loss of income of 20,000 Kčs per year. Innocently convicted applicants received larger sums than those who were partially guilty. In case of death, widows and first-degree relatives were entitled to compensation.

21. In Russia, the Law on Rehabilitation of Victims of Political Repression of 18 October 1991 adopts a large definition of repression, referring to all measures of coercion with political motives, including deprivation of life or liberty, forced labour, deportation,

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31 When discussing victims in the former Soviet Union context, victims will relate to the individual victims only.

32 Ibid., pp.2 et seq, for Russia.


34 A.P.van Goudoever, The Limits of Destalinization in the Soviet Union, in Roht-Arriaza, supra, no. 36, p.117; “Remembering Stalin’s Victims” supra, no. 36, p. 144.

expulsion and exile, since 1917. It is also applicable to people declared "socially dangerous" because of divergent religions or class affiliation. However, only illegal convictions or persecutions by the State were taken into account (articles 1-3). Rehabilitated individuals may obtain compensation of two thirds of their minimum salary multiplied by number of months in detention or exile (maximum 100 months; articles 11 et seq.), restitution of property and personal belongings and priority access to housing (article 16 paragraph 1). Heirs could only benefit from compensation if the direct victim of the violation had not received any (article 15). People in rural areas were entitled to interest-free loans and had priority access to construction materials (article 16 paragraph 1). Disabled persons and pensioners were entitled to free health care and diverse services, including free public transport in their residence area and priority admission to boarding houses (article 16 paragraph 2). The scope of beneficiaries was broad, including children raised in exile, but still limited to political opponents.

22. The Ukrainian Law On Rehabilitation of Victims of Political Repressions in Ukraine of 17 April 1991 applies to those who have been illegally convicted for certain enumerated political offences and, therefore, deprived of life or liberty, the consequences being close to those of the Russian law. Rehabilitated persons in need of shelter – in the case of their death, their spouse, parents and children – have a priority right to housing (article 6). Special rights are conferred to rural populations (such as interest-free loans), pensioners and disabled persons (such as access to free or less expensive medical services, free cars or travel passes, housing and communal services discount; article 6). Heirs are only exceptionally entitled to compensation if the direct victims had applied for reparations before they passed away (article 5). A draft law has extended the scope of the law to children of victims of repression who had indirectly suffered from those violations in their childhood. Reparations should include housing and medical benefits, especially for pensioners and disabled people, as well as free public transport.

ii. Germany

38Smith, "Destalinization", supra, no. 36; pp.116-118.
41Germany has introduced an abundance of reparations provisions. The national compensation process has been complex given negotiations with the Jewish Claims Conference and other actors (cf. Fn.4753). Alongside the described compensation programs, Western Germany has provided inter alia for a (restrictive) Federal Restitution Act, the Bundesrückerstattungsgesetz (BRüG). In Force 19 July 1957, since 1990 applicable to Germany as a whole; Available online at: http://www.gesetze-im-internet.de/bundesrecht/br_g/gesamt.pdf. Accessed 14 February 2011 (in German).
23. The *Federal Indemnification Act* (BEG)\(^{42}\) accorded lifetime pensions for “victims of national-socialist persecution” (period of 1933-1945), meaning persecution on grounds of political opinion, race, faith or belief (§ 1 BEG). Eligibility was restricted by a territorial limitation (presence on German grounds in 1952; §§ 4, 5 BEG) and to people criminally convicted for more than three years after May 1945 (§ 6 BEG).\(^{43}\) This excluded among others, all those persecuted and remaining outside West Germany; forced labourers, forcibly sterilised, “anti-socials”, Romani people and homosexuals.\(^{44}\) Compensation was awarded for loss of life, deprivation of liberty, damage to limb, health, property, career and economic advancement.\(^{45}\)

24. Protocol N°1 of the 1952 Luxembourg Agreement between the Federal Republic of Germany and Israel gave priority to elderly (beyond 60 years), needy applicants and to those with earning impairment of at least 50% due to illness or physical disability.\(^{46}\) In compliance with this, those persecuted whose earning capacity had been reduced were entitled to non-inheritable annuities. Elderly applicants who suffered from a decrease of more than 50% of physical ability were prioritised; males from the age of 65 and females from the age of 60 benefited from increased minimum amounts of compensation.\(^{47}\) Only in case of loss of life were indirect victims entitled to annuities (§§ 13, 17 BEG). Spouses, minor orphaned children and grandchildren, parents and dependants were recognised as indirect victims. Prioritisation among these groups was effectuated through different monthly minimum amounts being awarded to different groups.\(^{48}\) The death of an applicant as a result of a damage to limb or health was considered as “loss of life”, entitling “his survivors” to compensation (§ 41 BEG).

25. From 1980, a Hardship Fund for Jewish victims applying after the 1965 deadline provided for a lump sum payment equivalent to EUR 2,556 per victim. For those excluded from BEG on substantial grounds, from 1992 and 1998, the *Article 2 Fund* and the *Central and Eastern European Fund* offered monthly pensions (EUR 165-270) to Jewish victims in economic need who had received limited compensation.

26. In 2000, the *Fund for Victims of Medical Experiments* and a *Program for Former Slave and Forced Labourers* under the German Foundation Law (EVZStiftG) provided


\(^{43}\) Reparations for other applicants being made via other laws and agreements not mentioned here.

\(^{44}\) A. Colonomos and A. Armstrong, German Reparations to the Jews after World War II: A Turning Point in the History of Reparations, in: P. De Greiff (ed.), *The Handbook of Reparations*, (Oxford, OUP, 2006) p. 406. The first group was partly covered by interstate agreements with Western European States. Romani people and homosexuals – who could have been covered by the law – were considered having been arrested as “criminals” or “anti-socials”. For their indemnisation, see below, Fn. 48.


\(^{47}\) §§ 32-2, 39 BEG. In the initial law, sums were equivalent to DM 250 instead of DM 150.

\(^{48}\) § 19 BEG. Initial minimum amounts: widow/widower DM 200; orphan having lost both parents: DM 100; 1\(^{st}\) and 2\(^{nd}\) orphan having lost one parent: DM 75 (no annuity paid to widow/widower), DM 55 (annuity paid to widow/ widower); 3\(^{rd}\) and further orphan: DM 50; grandchild having lost both parents: DM 100; parents in ascending line together DM 150; one surviving parent: DM 100. Amounts were adjusted in the following amendments.
payments of EUR 7,669 to “slave labourers” and EUR 2,556 to “forced labourers”. The fact that compensation for slave labourers is higher than for forced labourers appears to be based on the belief that the former constitutes a more serious violation, causing more harm than the latter. Other groups have not or only very recently received compensation as individuals.

c) Africa and Arabic States

27. The following section will consider reparations programs and truth commission suggestions in Ghana, Liberia, Morocco and Rwanda, as well as, Sierra Leone and South Africa.

i. Ghana

28. The National Reconciliation Commission of Ghana (NRC), established in 2001, was mandated to “recommend the appropriate response to the specific needs of each victim or group of victims” and to set up a reparation and rehabilitation fund in relation to the killing, abduction, disappearance, detention, torture, ill-treatment and seizure of property during three periods of unconstitutional government between 1957 and 1993.

29. The NRC urged a comprehensive policy. It suggested, inter alia, erecting different monuments: a national monument in Accra dedicated to the “killed, disappeared […] and to the unknown victims of human rights abuse” with their names engraved; another monument to the Ghanaian women; and, regional monuments for traders and other civilians. It further recommended scholarships for one child per victim belonging to one of four categories: 1) deceased persons; 2) disappeared persons; 3) disabled people; and, 4) victims of any other human rights violation, as well as,

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49This much-criticized distinction is complex and has changed over time. “Slave labor” in the sense of the German Foundation Law (§ 11 (1) N°1) only refers to “persons who were held in a concentration camp as defined by the German Indemnification Law or in another place of confinement or a ghetto under comparable conditions and were subjected to forced labor”. “Forced labor” (11 (1) N°2) refers to any “persons who were deported from their homelands into the territory of the German Reich, according to the borders of 1937, or to a German occupied area, subjected to forced labor or subjected to conditions resembling imprisonment or similar extremely harsh living conditions”. Translations taken from the site of the Claims Conference, Available online at: http://www.claimscon.org/index.asp?url=slave_labor/eligibility. Accessed 23 June 2011. For the original law Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft”, in force 12 August 2000, see: http://bundesrecht.juris.de/bundesrecht/evzstiftg/gesamt.pdf. Accessed 23 June 2011.


51Only in 1982, Porrajmos was recognized as genocide by the German government. From 1987, individual hardship provisions i.a. for “non-political” and “non-racial” persecution have been introduced on the level of the federal States. Others are eligible in terms of a law dealing with “general consequences of the war” (according to the Allgemeines Kriegsfolgenegesetz).


expropriated traders. The child had to be “born to a victim–petitioner or for whom a petition was made”.

30. Compensation should depend on the nature of violations suffered. The NRC indicated amounts: loss of life including disappearance (Ghana Cedi [GH₵] 20–30m), torture (to death: GH₵ 15-30m; otherwise GH₵ 5-15m), disability (resulting from torture, shooting or bomb outrage: GH₵ 5-10m), detention (between GH₵ 2m: less than 6 month and GH₵ 15m: more than 5 years), exile (between GH₵ 3m: less than 2 years and GH₵ 10m: more than 5 years), sexual violations (rape: GH₵ 10m, gang rape: GH₵ 15m, other: GH₵ 5m), ill-treatment (GH₵ 1-15m) and seizure or destruction of property (GH₵ 1-10m, with further differentiation according to profession or good).\(^{55}\) As a matter of general principle, the NRC recommended a one-off payment. In case of multiple violations, only the severest violation should be compensated, with a possible top-up of around 2-3m GH₵. Victims who had already been (partially) compensated were non-eligible or entitled to a top-up only.\(^{56}\) In an annex, the NRC provided an exhaustive list of 2,514 victims that it considered being eligible for reparations. 2,177 of them were to receive monetary compensation while the others were to get restitution of their employment or of their property.\(^{57}\) For each individual, the NRC indicated the appropriate reparations measure (but not the violation) and, if applicable, the amount of compensation, reaching from USD $36 to 1,938 or 1-30m GH₵.\(^{58}\)

31. However, the government only accepted to set up a fund for compensation, awarding amounts between GH₵ 2-30m per victim and depending on the gravity of the violation or abuse.\(^{59}\) On this basis, beneficiaries have received one-off payment ranging between USD $217 and USD $3,300.\(^{60}\)

ii. Liberia

32. The final report of the Liberian TRC recommends a prioritisation according to vulnerability and neediness. For instance, it recommends comprehensive health services “for all physically challenged individuals […] incapacitated as a consequence of the civil war” and “personal cash or material assistance” without preclusion. It further requests community development projects, including education, health and infrastructure, “for communities most victimised by years of conflict.”\(^{61}\)

\(^{54}\)NRC Final Report, ibid, Chapter 2; 2.4 – 2.4.1.5. The report also mentions a specific local reparation – establishment of a market – for the town of Namoo, 2.4.1.7.

\(^{55}\)NRC Final Report, October 2004, Volume 3, Chapter 2; 2.4.3.3; definition of each category of violations in Chapter 2.5.

\(^{56}\)Ibid, Chapter 2; 2.4.3.2.


\(^{58}\)NRC Final Report, Chapter 2, Part II. It seems that only the direct victim is mentioned in the list and that the next of kin will only be compensated on behalf of the direct victim in the case of death, cf. Lines 86, 33, 152, 395, 437. If this is true, indirect victims are only vised by scholarships (s.a.).


\(^{60}\)IRIN Africa, Ibid.

33. The TRC followed a gender and children sensitive approach. For example, it urged the extension of micro economic programs and lending schemes for women, especially in rural areas, with flexible conditions suitable for the poor.62 It also recommended free medical services and trauma counselling for women victims of sexual and physical violence, and scholarships for their children.63 The TRC requested a focus on post-conflict needs “of all children”, by prioritising programs for entire communities as well as “children as a group”.64

34. According to the TRC, “reparation for members of the disadvantaged communities should be prioritised considering their inability to equally compete under normal circumstances without affirmative action”, as the conflict has had a specific impact on them. These “vulnerable groups with special needs” include the “blind, handicapped, deaf, amputees, hard of hearings, people suffering from mental disease or illness, the elderly, etc.”65

iii. Morocco

35. The Equality and Reconciliation Commission (IER) was explicitly set up to evaluate disappearances and arbitrary detentions between 1956 and 1999.66 Its final report chose eleven regions – places of grave violence or of secret detention centres – to benefit from divergent community-based collective reparations. After consultation, the measures were adapted to respond directly to the events that had occurred in the regions.67

36. Deprivation of liberty was considered as common criterion for all victims, entitling them to monetary compensation. Subgroups were established for those subjected to enforced disappearance or arbitrary detention. Furthermore, beneficiaries were classified in groups according to the reason and circumstances of the deprivation of liberty. The amounts of compensation vary according to the length of detention, conditions and circumstances of deprivation (torture, sexual violence) and harm suffered. For detention only, loss of earnings and opportunities, permanent disabilities and other consequences are taken into account.68

Accessed 12 January 2011, at 17.1, p.378, and at 17.3, p.379, referring to the example of Lofa County and its housing needs.
37. In the case of death, the mother and father of the deceased each receive 10% of the compensation for material injury, and not more than five children and spouses, 40% each (reduced for the divorced spouse); not more than five siblings might be entitled to lump sums. If the relative died later because of other reasons, calculations are made according to harm suffered and time passed after the relative’s death. Additional payments can be obtained for forced exile, hiding or rape. The situation (“settlement”) of the victim is taken into account. For this, beneficiaries were divided in seven different categories, depending on their social situation, all of them being entitled to compensation based on their physical and moral injuries, but the members of some categories were entitled to other measures. 69

iv. Rwanda

38. Amongst the beneficiaries of special welfare for survivors of the 1994 genocide, article 14 of the 2003 Constitution accords priority to “the disabled, the indigent and the elderly as well as other vulnerable groups.” 70

39. By Law N°2/1998, Rwanda has established the rehabilitation funds FARG (“Fonds d’Assistance aux Rescapes du Génocide”) for victims in most need of the massacres that took place between 1990 and 1994 and the genocide against Tutsis in 1994. 71 Article 14 provides that all needy rescapés (literally: survivors) of the 1990-1994 massacres and genocide are entitled to reparations, priority being accorded to orphans, widows and disabled persons. The FARG provided for assistance measures, notably housing, education and health; education being explicitly prioritised since 2000. 72 A 1998 government census determined 282,804 victims meeting the criterion of neediness, they were asked to indicate their reparation priorities. 73

40. To qualify as rescapé, the person must have escaped from genocide or massacres aimed at them because of their ethnicity or that of close relatives, their moderate political opinion or opposition to genocide (moderate Hutus; Article 14 paragraph 2). Rwandan society has a narrow interpretation of indirect victims of genocide: close relatives were entitled to indirect victim status if they had also “escaped”. 74 As the

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69 Report, pp.36-45, with conditions for each case. For instance, students who had to interrupt their studies were entitled to vocational or professional training; people working in the private sector or in agriculture were eligible for other reparation programs and elderly people for social services. Numbers of applicants for reparation can be found in the Follow-up report, December 2009. Available online at: http://www.ccdh.org.ma/IMG/pdf/follow_UP_IER.pdf. Accessed 12 January 2011.


74 Rombouts, ibid, pp. 200 et seq., with examples. The classification is even more complex for indirect victims, especially children and spouses. For instance, a child whose Tutsi mother was killed, living with its Hutu father, is a Hutu and will not be regarded as persecuted and, therefore, not be a rescapé. Though, according to some, if
The notion of *rescapé* has been mostly understood as being victimised because of their ethnicity, the FARG has been criticised to be a “Tutsi fund” largely benefiting Tutsi survivors of genocide, neglecting the aspect of massacres against moderate Hutu and crimes committed by the Tutsi-dominated RPF. A determining factor that helped Tutsis to benefit particularly from this fund was the important role played by victim associations in selecting FARG beneficiaries and in distributing its resources.

41. The FARG law was modified by Law No. 69/2008 (article 29). The new fund carries out special activities, particularly for the elderly, needy, handicapped and incapacitated people, but also students, orphans and spouses (article 4). Examples are the construction of houses for needy elderly people, especially those without children, for orphans, surviving spouses and the handicapped who need shelter (4°); medical treatment for the needy and handicapped, as well as those infected with incurable diseases caused by gender-based violence, including AIDS (6°). The Law focuses exclusively on survivors of the “Genocide against the Tutsi and other crimes against humanity”. Beneficiaries are classified in two categories, category 1 (article 26, paragraph 1, 1°-4°); orphans, surviving spouses, elderly people whose families have been killed, people deprived of property, shelter or having inherited bank debts, handicapped people, people with incurable or deadly diseases and category 2 (paragraph 2, 1°-2); poor children born from orphan mothers; and children of *rescapé* parents children with incurable diseases or disabilities 9). In any category, priority shall be accorded to those in most need.

42. A second fund, FIND (“Fonds d’Indemnisation”), dedicated to replace FARG, extending indemnification to all victims of genocide, war and massacres independent of economic needs and circumstances, has been considered since 1996 under different draft laws but is not operational to date. The 2001 draft considered monetary compensation for direct victims – even if already beneficiaries of reparations under FARG –, their family...
members and for disabled people. Compensation should be paid for loss of life, material loss and permanent incapacity. In case of material loss, the rightful legal owner would be entitled to compensation for houses and household objects, crops and animals. For loss of life, beneficiaries would be the legal spouse, legal children and the parents (article 13). If none of them has survived, the entitlement passes on to grandparents, siblings, grandchildren and uncles/aunts (in this order; article 14).

43. In case of incapacity, the amount of compensation should depend on the age (three categories: under 18, 18-55, over 55) and degree of permanent incapacity (categories from 5-10% up to 80%) of the direct victim. Indirect victims were eligible at the same time as the direct victim, and in the same order as those for loss of life; the amount varying according to the degree of kinship. The award for victims between 18 and 55, considered the neediest, was twice the award for a victim under 18 years of age and four times the amount for a person aged over 55. Spouses would receive one quarter of this sum, and children one eighth. In case of death, a spouse should receive FRW 3 m, a child FRW 2 m and an uncle FRW 500,000 (article 16, Annex C).

44. The 2002 draft law, eliminating all elements of prioritisation, has restricted compensation to equal lump-sum payments of FRW 12 m. It has extended the scope of the fund to other forms of reparations, notably social services, as alternatives to compensation. In contrast, it seems that a narrow interpretation of victims – close to the notion of rescapé – has been adopted (article 17). There are three groups of beneficiaries: 1) rescapés; 2) legal spouses, children, siblings, parents of rescapés; and, 3) Rwandan nationals outside the country during genocide who have lost their spouses, children born in wedlock, siblings or parents who would have been considered as rescapés if they had survived. The claim of women's organisations' to include among the beneficiaries “illegitimate” widows or wives – who represent the great majority of women in Rwanda –, has not been heard.

45. To date, reparations in Gacaca courts have largely focused on restitution or compensation for lost property. In rare cases where compensation for loss of life has

79 Rombouts, Women and Reparations supra, no. 77, p. 199.
80 Rombouts, ibid, pp. 217-218. Illegitimate spouses and children are excluded although they represent the Rwandan norm.
81 Rombouts, and Vandeginste, supra, no. 75, p.331 and no. 54. The maximum amount of FRW 400 m was suggested for a victim between 18 and 55 with incapacity of 80%, P.331 and no. 54.
85 Despite the abolition of discriminative laws for married women in 1999, contradicting customary property and inheritance law has often been applied. Customs discriminate against women and illegitimate children regarding land ownership with the result that women and widows have been excluded from land titles and, consequently, from loans and credits requiring those titles. See Waldorf, supra, no. 78, pp.527, 538-530. Rombouts, Women and Reparations, ibid, pp. 204-205, 210.
been awarded to close relatives, no principles were mentioned. Sexual violence as well as the particular vulnerable situation in which women found themselves during and after the genocide have not been specifically addressed by any of the reparations mechanisms.

v.  **Sierra Leone**

46. Sierra Leone’s TRC prioritised its reparations based on the vulnerability of victims and not on harm and suffering they had endured. All victims not eligible for the program established by the TRC were referred to the general recovery programs. The reparations program exclusively applies to “(1) amputees; (2) other war wounded; (3) children; and (4) victims of sexual violence [including forced marriage]”, as they have suffered multiple violations “due to their particular vulnerability either before or after the commission of the violation”. As indirect victims, war widows are included. Ex-combatants are excluded if they have already benefited of a parallel measure under a veteran program.

47. The Commission set out detailed criteria for each of the mentioned categories and it established the reparation measures to be awarded. For instance, “children who are amputees, 'other war-wounded' [...] victims of sexual violence, children who suffered abduction or forced conscription, orphans, children of amputees, other war wounded if their parents experienced a 50% or more reduction in earning capacity [...], and victims of victims of sexual violence” shall receive free education up until senior secondary school. Disabled and victims of sexual violence shall be prioritised, while children already benefiting from Disarmament, Demobilisation, and Reintegration programs (DDR) are excluded. For women victims of sexual violence, specialised physical and mental treatments, including HIV treatment and fistula surgery, are provided. In addition, the TRC suggested, “community reparations [which] contribute to the reconstruction and consolidation of institutions in communities that were the hardest hit during the conflict and make them whole again through the provision of capital and technical assistance”.

vi.  **South Africa**

48. The Reparations and Rehabilitation Committee (RRC) of the South African TRC was mandated to recommend reparations for gross human rights violations such as killing, abduction, torture or severe ill-treatment, from 1960 to 1994. Any person referred to it by the Committees on Human Rights Violations or Amnesty could apply for reparations

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87Rombouts, Women and Reparations, *ibid*, pp. 207-210, 211 et seq., 214 et seq.


89Ibid., pp. 242-243, paras.54-55, 57-58, and paras.87 et seq., pp.248 et seq.

90Ibid., p. 244, para.65.

91Ibid., p. 245, paras. 69-70: principle of double benefits.

92Ibid., pp. 251-270, paras. 103-236.

93Ibid., p. 261, paras.178-181.

94Ibid., paras. 134-154, 159-167.

95Ibid., p. 263, para. 206 et seq.
and urgent interim measures (UIM).96 The notion of victims was initially large, including “such relatives and dependents of victims as may be prescribed”.97

49. The RRC suggested a monetary package of ZAR 21,700, paid for six years, calculated according to three criteria: 50% as “acknowledgement of the suffering caused”, 25% to “facilitate access to services” and 25% to “subsidize daily living costs”. Having assessed particular vulnerability, slight priorities were suggested for rural populations, because of higher living costs, and for victims with a large number of dependents. For them, compensation could reach up to ZAR 23,023 (for nine or more dependents). Monies were to be made available to each surviving victim or, in the case of death, “equally divided amongst relatives and/or dependents” having applied for reparation.98 It was recommended that communities that were subjected to systemic abuse should have access to rehabilitation programs, including specialised health, social services and education. Special programs should be provided for demilitarised youth involved in, or witnesses of, political violence and to displaced persons.99

50. UIM have been limited to those accepted as victims by the TRC.100 Based on the criterion of urgent need, the Committee suggested limited financial assistance and appropriate need-based services based on the seriousness of the victim’s suffering at the time of the assessment.101 More detailed criteria, all based on vulnerability, are provided for the five categories of measures: eligible for emotional interventions were victims “whose emotional quality of life [is] severely affected” and to orphaned victims with “inadequate material support to meet their immediate emotional needs”. Material, medical and symbolic interventions were accorded to victims terminally ill and/or frail who would not survive beyond the TRC, victims and dependents without fixed shelter and, again, orphans with particularly difficult living conditions. For medical interventions, priority was also accorded to physically disabled and permanently impaired persons whose quality of life has been severely affected. Finally, educational interventions were dedicated to victims and their dependents whose studies had been interrupted, as well as to orphans, socially disadvantaged children and mentally or physically disabled victims requiring specialised education.102

51. Presidential Regulation 1660, gave an entitlement to a one-off fixed payment of R 30,000 for any victim identified by the TRC. Awards had to be made in the following order, the grant devolving to the successor only in case of death: identified victim, beneficiary of the UIM on behalf of this victim, spouse of the identified victim (equal distribution in case of multiple spouses), children, parents, nearest relatives in degree.

97 Ibid, Section (1).
99 Ibid, Para.16.
Preference could be changed on a case-by-case basis. As of 2009, about 18,000 direct victims or surviving relatives listed by the TRC were granted one-off sums of ZAR 30,000. Besides UIR, the realisation of the program remains incomplete; compensations have not been fully paid.

**d) Asia and Oceania**

52. For Asia and Oceania, Timor L’este will serve as example.

   **i. Timor L’este**

53. The Commission for Reception, Truth and Reconciliation (CAVR) has recommended providing reparations for the “most vulnerable”, which include “those who live in extreme poverty, are disabled, or, who [...] are shunned or discriminated against by their communities”. Those victims should be prioritised and granted “access to basic services and opportunities provided to the general community”. This group includes “victims of torture; people with mental and physical disabilities; victims of sexual violence; widows and single-mothers; children affected by the conflict and communities who suffered large-scale and gross human rights violations...” Amongst the communities, priority should be accorded to those with a high percentage of victims belonging to the pre-cited categories. CAVR further recommended that 50% of the programs should benefit women as they had been disproportionately targeted, especially by sexual violence and discrimination.

54. CAVR itself has provided 712 victims with urgent needs payments of USD $200, several of whom “were supported to participate in healing workshops and public hearings”. It further enacted “pilot projects on collective measures for urgent reparations in severely affected communities”. Primarily eligible were “direct survivors of human rights violations such as rape, imprisonment and torture” and “those who suffered indirectly through the abduction, disappearance or killing of family members.”

**e) United Nations Compensation Commission**

55. The United Nations Compensation Commission (UNCC) allows for the examination of a *sui generis* global initiative to provide reparations for a massive group of victims.

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107 *Ibid*. PP. 39-41, with further definitions for the above-mentioned groups.


56. In order to facilitate the processing of the nearly 2.7 million claims received from victims of Iraq’s unlawful invasion and occupation of Kuwait in 1991, the UNCC divided them into six categories.\textsuperscript{110} Within them, for humanitarian reasons,\textsuperscript{111} priority was given to Categories A (external displacement), B (serious physical or mental personal injury and death), and C (individual losses up to USD $100,000 including death, and serious personal injury of immediate family members);\textsuperscript{112} while Categories D (individual claims for damages above USD $100,000), E (corporations, other private legal entities and public sector enterprises), and F (claims by Governments and international organisations) were not treated as a top priority, and also required additional evidence or higher standard of proof.

57. Still, among priority Categories A, B, and C, different standards of proof were set, which could be considered an indirect way of prioritising claims. Claims in Categories A and B were handled through an expedited procedure, did not require proof of the actual amount of damage, but did require the presentation of simple documentation that proved the fact and date of displacement, of injury, or of death and family relationship.\textsuperscript{113} As for Category C claims, they were also handled through an expedited procedure but, in this case, the evidence required was “the reasonable minimum that is appropriate under the circumstances involved, and a lesser degree of documentary evidence would ordinarily be required for smaller claims, such as those below $20,000”.\textsuperscript{114}

\textbf{f) Conclusions: Reparations Programs}

58. The preceding case studies have shown that reparations programs use different criteria to prioritise the award of reparations, the main being:
- prioritisation according to the personal condition of the individual applicant (or group of applicants);
- prioritisation according to the nature of violations to be redressed; and,
- prioritisation of particular groups of victims.

The use of one of these criteria does not exclude the others. Indeed, they are usually combined and could overlap.

59. Prioritisation of beneficiaries has been made according to several factors, such as:
- the gravity of the violation in question;
- whether they are direct or indirect victims;
- the economic situation or neediness; and/or,
- the vulnerability of the individual or collective beneficiaries (including age, disability or affiliation to a particular social group).

60. Another way prioritisation has been used is across indirect victims, especially family members of victims, assigning the percentages of how compensation should be

\begin{footnotes}
\item[111]Ibid. PP. 340-341.
\item[112]Ibid. P. 338.
\item[114]Ibid. Paras. 14-15.
\end{footnotes}
distributed among those recognised as entitled to it, or varying the amount of compensation according to the (presumed) gravity of harm or violation.

61. Priority may also be accorded when redressing systematic or characteristic violations (for example, freedom of expression, deprivation of life or liberty, forced labour, freedom from torture, deportation or disappearance). In other cases, only certain violations are covered by the programs. Indirect prioritisation may also be revealed through fixed amounts of compensation for each violated right.115 Though, the option of fixed amounts carries the danger that different violations are ascribed a certain “value” or “currency”, and that individual needs and circumstances are not considered.116

62. Some reparation programs have prioritised selected groups, mostly of a social, ethnic or political nature.117 A dangerous consequence of this prioritisation might be a political or ethnic bias in favour of the new dominant group, or an exclusive focus on selected groups of – domestically or internationally supported – beneficiaries while other needy groups might be neglected or overshadowed.118

III. Jurisprudence

63. Besides the practice of domestic and international reparations programs, international human rights courts have been important actors regarding the prioritisation of beneficiaries for the purposes of reparations. The following section will analyse which principles have been developed and applied by the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) and how these Courts have employed their criteria.

a) European Court of Human Rights (ECtHR)

64. Principles guiding the award of reparations under article 41 ECHR119 are scarce. Nevertheless, the Court tends to decide the award on reparations “on an equitable basis”.120 In addition, the application of the few principles does not always seem coherent. However, there appears to be a rough differentiation according to the type of violation, which shall be examined in the following section. In parallel to the work of

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115 cf. the cases of Ghana and South Africa, supra.
117 cf. the cases of Germany – from the perspectives of legal basis and implementation – (focus on Jews and political persecutes), Soviet Union (political prisoners only) and Rwanda (focus on Tutsi).
120 See, for instance, ECtHR, Tahsin Acar v Turkey, no 26307/95, 8 April 2004, para.264.
the ICC, the chosen exemplary cases will concern killings, disappearances, torture, detention and property (articles 2, 3, 5 ECHR\textsuperscript{121} and article 1 of Protocol 1\textsuperscript{122}).

\textbf{i. Beneficiaries}

65. Under the ECHR, only applicants are considered as “injured parties” entitled to reparations (article 41 ECHR), this term being interpreted restrictively. Exceptionally, the Court has awarded compensation to the relative of an applicant due to the particular gravity of the violations in the absence of an admissible request.\textsuperscript{123} Even regarding loss of life, the scope of indirect victims is limited to heirs or very close next of kin, with few exceptions.\textsuperscript{124} Mostly, eligibility for compensation depends on the ties existing between the applicant and the direct victim.\textsuperscript{125}

\textbf{ii. Loss of life}

66. As many cases awarding reparations to indirect victims concern a violation of article 2 of the European Convention – the next of kin applying on behalf of their lost relative –, these cases seem to be useful to detect criteria of prioritisation. Four cases show exceptional features.

67. In Nachova et al. v. Bulgaria, two non-armed Roma were killed by the military police forces instead of being arrested. The State failed to investigate although there was evidence of racist verbal abuse, the police acted excessively and the persons killed emanated from an ethnic minority. The Court held that the State had violated its positive obligation to investigate under the right to life (article 2, read with article 14 ECHR).\textsuperscript{126} It awarded the mother and daughter of one victim (jointly) EUR 25,000, and the parents of the other EUR 22,000. Although both deceased had financially supported the family, the Court made a distinction for pecuniary loss taking into account “the age of the victims and the applicants and how closely they were related to each other”\textsuperscript{127}.

68. In Estamirov et al. v. Russia, five family members were murdered: the father; one of his sons, his pregnant wife and their baby son; and a cousin. The other son (applicant n°1), his four sisters (applicants n°2, 3, 6, 7), their mother (applicant n°4) and the second son of the murdered couple (applicant n°5) were applicants. The son (n°1) was awarded EUR 5,675 for material damages (loss of earnings) on behalf of his nephew (n°5), whom he had to bring up after the death of his brother and sister-in-law. Their mother (n°4) received EUR 2,076 due to her husband’s death. As for non-pecuniary damages, the Court awarded EUR 10,000 each to three sisters, and EUR 35,000 each to

\textsuperscript{121}ECtHR, De Wilde, Ooms and Versyp v. Belgium, just satisfaction, no.2832/66; 2835/66; 2899/66, 10 March 1972, para. 23. See also Rule 60 of the Rules of Court and ECtHR, Angelova and Iliev v Bulgaria, no.55523/00, 26 July 2007, para. 127.


\textsuperscript{123}cf. ECtHR, Bursic v Romania (in French only), no.42066/98, 12 October 2004, para. 124 (here the widow). For an example of the classical approach of the Court to ignore relatives who are not applicants, see ECtHR, Tahsin Acar v Turkey, supra, no. 123, paras. 1, 263.

\textsuperscript{124}ECtHR, Baragan v Romania, n°33627/96, 1st October 2002, para. 49.

\textsuperscript{125}See e.g. ECtHR, Çakıcı v. Turkey, no.23657/94, 8 July 1999.


\textsuperscript{127}Ibid, para. 172.
the brother and the last sister (n°2), who had both travelled to Grozny to communicate with the authorities. This affirms the Court’s tendency to measure family ties by assessing the active role they had seeking justice. The mother (n°4) received EUR 50,000, and the orphan EUR 70,000 because of the "special family ties with the deceased and the impact the deaths must have had on them".\textsuperscript{128}

69. In a third case, \textit{Isayeva, Yusupova and Bazayeva v. Russia}, the Court asserts that the seriousness of the violation impacts on the assessment of non-pecuniary damages. It awards EUR 25,000 to an injured woman who had lost two children and other relatives in a bombing of a civil convoy, noting the “modest nature” of the claim.\textsuperscript{129}

70. \textit{Abuyeva et al. v. Russia} concerns the same village and the same day. Chechen fighters and military forces carried out an assault with aviation bombs, killing or wounding \textit{inter alia,} the applicants and their next of kin. The Court indicates a list of the 29 applicants, including the violations, the killed and injured relatives, and the degree of relation as well as the amounts awarded. It thereby regrouped victims according to the harm suffered, awarding EUR 30,000-EUR 120,000 per person. However, it did not differentiate according to the degree of family relationship. It awarded EUR 60,000 each per killed relative (whether son, father, husband, sister, mother-in-law, brother-in-law or nephew) and EUR 30,000-40,000 per wounded, depending on the severity of the injury (EUR 40,000 for amputation of a leg, severe loss of blood, piercing wounds in dangerous areas). Applicants received the same amount for their own injuries as well as for those of their children. Amounts were cumulated.\textsuperscript{130} However, three applicants were treated differently. Having lost between two and four relatives – mother, brother, stepmother, daughter-in-law –, they only received EUR 40,000 each per lost family member.\textsuperscript{131}

\textbf{iii. Deprivation of Liberty and Damage to Health}

71. Another group of cases concern the articles 2, 3 and 5 of the ECHR. Special attention is given to the Turkish and Russian disappearance cases as they could be considered as systematic violations.\textsuperscript{132}

72. In \textit{Angelova and Iliev v. Bulgaria}, the Court makes a general statement, noting that it awards, “surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings”, and “as regards the deceased […], such sums to be

\textsuperscript{128}ECtHR, \textit{Estamirov et al. v. Russia}, n°60272/00, 12 October 2006, paras. 8, 129, 134. The brothers and sisters had claimed EUR 35,000 each but the Court reduced the amount to EUR 10,000 for three of the sisters without giving reasons.

\textsuperscript{129}ECtHR, \textit{Isayeva, Yusupova, Bazayeva v. Russia}, n°57947/00; 57948/00; 57949/00, 19 December 2002, paras. 247-252.

\textsuperscript{130}ECtHR, \textit{Abuyeva et al. v. Russia}, no. 27065/05, 2 December 2010, paras. 7-8, 253 and attached table.

\textsuperscript{131}It is difficult to explain this differentiation. The only relevant sentence of the Court regarding reparations states: “Considering the individual situations of the applicants, it awards them the sums indicated in the attached table” (para. 253). It might have been difficulties of proof. Applicant 24 had not been accorded formal status by the authorities; although she claimed that she had been interrogated; her four relatives had not been listed amongst the victims. Though, her case was later adjudicated on by the military court which was not the case for all the applicants (paras. 156, 180, 213). However, the Court draws the conclusion that all applicants have to be considered equally under procedural aspects (para. 181). Applicant 25, though, was granted victim status and could provide death certificates (para. 142). There is even less an explanation for applicant 26.

\textsuperscript{132}These cases are often difficult to distinguish from the first group as also disappearances have been treated under article 2 if the applicant died. On the contrary, a presumption of death in case of disappearances has only been developed in later years.
held for the person's heirs, [...], the balance of the awards represent[ing] compensation for the victim's own pain and suffering”. If the ill treatment is inflicted by private individuals, awards will be made only for the suffering subsequent to their relative's death, which lies in the responsibility of the State. The ECtHR considered that the three sisters of the deceased did not join the proceedings and thus were not eligible alongside the applicants, his mother and brother. In the case of Tahsin Acar v. Turkey, the Court awarded GBP 10,000 of non-pecuniary damage to the brother of a disappeared, the only applicant, refusing to provide compensation to the close relatives although they had been intensely involved in the search for him.

73. The Court, in Varnava et al. v. Turkey, has rejected the existence of “specific scales of damages” to be awarded in disappearance cases. As a precondition for non-pecuniary damage, it is required that, “the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity”. In the South-Eastern Turkish torture cases, practice has therefore been diverging which shall be shown by the following two examples. In Ilhan v. Turkey, the Grand Chamber awarded GBP 25,000 on behalf of a victim of severe life-threatening torture “having regard to the circumstances of the case” which left him with a long-term loss of functions. However, unlike in many killing and disappearance cases, it considered that the applicant in the case, the brother of the tortured victim, was not entitled to claim non-pecuniary damages for himself as “injured party”. Although the Court stated that he “was the member of the family who came immediately to the hospital on learning of his brother’s injury and who took the necessary steps for obtaining the treatment he needed”, it held that the applicant had not been tortured and that only the tortured victim was to be awarded non-pecuniary damages. In Salman v. Turkey, the same day, although the applicant died in custody and the Grand Chamber found a violation of articles 2, 3, and 13, it still awarded the same amount for non-pecuniary damage. The gravity of the harm, the consequences of the violation, as well as the number of provisions violated, therefore, seem to have less importance in the assessment of damages. As the applicant's wife had been threatened and beaten while being questioned, she herself received GBP 10,000 without further reasoning. Though, while assessing a violation of former article 25 ECtHR, the Court accentuated the special vulnerability of villagers in Southeast Turkey, in general, and of the applicant, in particular, her anxiety and distress, which therefore may be a reason for the award. In other cases, applicant's relatives who could prove a close tie and who were involved in the search for the disappeared or tortured, could make a claim on their own behalf, especially if the Court had considered their own rights to be violated.

133ECtHR, Angelova and Iliev v. Bulgaria, supra, no. 124, paras. 128-129.
134ECtHR, Tahsin Acar v. Turkey, supra, no. 123, paras. 261 et seq., 35 et seq., 211 et seq.
136ECtHR, Ilhan v. Turkey [Grand Chamber], n°22277/93, 27 June 2000, paras.112-113, 53-54. The Court also awarded GBP 80,600 for pecuniary damage because past medical expenses and loss of earning were well documented. Para. 109.
137However, in the case of Assenov et al. v. Bulgaria, n° 90/1997/874/1086, 28 October 1998, the Court accentuated that it awards compensation according to the “gravity and number of violations found in this case”, para. 175.
138ECtHR, Salman v. Turkey, n°21986/93, 27 June 2000, paras. 130 et seq., 140.
139Cf., for instance, ECtHR, Çakıcı v. Turkey, supra, no. 128, para. 130 (GBP 10,000 for the mother of a disappeared, herself victim of a violation of article 3 during the search for her son without the States' help);
74. Amounts of GBP 10,000-25,000 have been allocated in other Southeast Turkey cases. The Court usually refers to the “awards made in previous cases involving the violation of the same provision in South-Eastern Turkey […] and having regard of the circumstances of the case”. Similar awards have been made in comparable Chechnyan cases, for instance in Bazorkina v. Russia. The mother of a disappeared – herself victim of a violation of article 3 due to her emotional suffering – received EUR 35,000 (roughly GBP 24,000 at the time). The Court, thus, seems to pay attention to particular regional and local situations.

75. The amount of compensation may depend on family ties but not necessarily on the degree of relatives. However, the Court will consider whether the rights of the applicant’s relative had been violated as well.

76. In Kiliç v. Turkey – a case concerning a killing – and Mahmut Kaya v. Turkey, a disappearance case, the Court awarded, via the applicant, GBP 15,000 to the wife and children, on behalf of their deceased head of family, referring to the awards made in prior cases. In Tanis et al. v. Turkey where the Court found a violation of articles 2 (substance and procedure), 5 and 13 due to the disappearance of two party leaders who, as the applicants – close family members – claimed, were victims of extra-judiciary executions. The Court also found a violation of article 3 regarding the applicants who had made numerous requests and suffered from particular anguish. As for pecuniary damage, the wife of the first applicant, mother of two children, asked for EUR 150,000 and received EUR 40,000 for the loss of financial support. The second applicant had a wife (with four children) and a partner (with four children) – both were not listed amongst the applicants – who claimed EUR 100,000 each and received EUR 50,000 jointly, the facts being identical for the two disappeared. As of non-pecuniary damages, the Court awarded EUR 20,000 to each of the six persons claiming damages, although the four applicants (wife, father, brother of the first disappeared; brother of the second) and the two women (wife and partner of the second) had claimed very different sums (between EUR 50,000 and EUR 250,000).

77. In other cases not involving systematic violations, the Court refers to similar or comparable cases. However, it sometimes seems to adopt an individual approach. It apparently takes into account the age of the victim – in the case of a 17-year-old who had died in custody – while it appears to be reticent to award additional damages in the case of discrimination on ethnic grounds (for instance, Romani or Gypsy; notably, if

Çiçek v Turkey, n°25704/94, 27 February 2001, para. 205 (the same for a mother of two disappeared sons); Ergi v Turkey, n°23818/94, 28 July 1998, para. 110 (GBP 1,000 for violation of article 3 and 5,000 to his niece as the daughter of the deceased sister).

140 Cf., for instance, ECHR, Ertak v. Turkey, n°20764/92, 9 May 2000, para.151 (GBP 20,000); Çakıcı v. Turkey (GBP 25,000), supra, no. 128, para. 130. In Kılıç v. Turkey (GBP 15,000), n°24276/94, 25 May 1998, the Court had given as reason the gravity of the breach, para. 174. In Oğur v. Turkey, n°21594/93, 20 May 1999 (100,000 FRF), it referred to the equitable basis, the considerable suffering “from the consequences of the double violation of article 2”, para. 98.

141 ECHR, Bazorkina v. Russia, n° 69481/01, 27 July 2006, para.181. Larger awards have been made in more recent cases. One will also have to consider that the Turkish disappearance cases date from the mid-1990s to the early 2000nds while the Chechnyan cases start in the mid-2000nds – a development can be observed.


143 ECHR, Tanış et al. v. Turkey, 2 August 2005, n° 65899/01, paras. 3, 12, 221, 229-232, 233-235.
the Court did not find enough evidence under Article 14). In other cases, the Court has taken into account the “particularly grave circumstances of the case” and the “nature of the multiple violations”.

iv. Other Violations

78. By comparing the first two groups, extremely serious violations and cases concerning other provisions of the European Convention, the gravity of the violation and the importance of the violated right seem to be significant. For instance, in the two Roma cases concerning the right to education without discrimination (article 14 ECHR read with article 2 Protocol 1), the Court awarded EUR 4,000 to 4,500 to each applicant. In recent practice, although not universally applied, there appears to be a "standard" amount of compensation for each right, derived from comparable cases. Exceptionally, significantly higher awards are made.

v. Loss of Property

79. In its first pilot judgment, *Broniowski v. Poland*, the Court has contented itself to find a violation of article 1 of Protocol 1 due to a systemic defect and the State’s failure to implement compensation. The Court then struck the pilot case out of the list after having assessed the compatibility of the new Polish legislation with the ECHR, declaring that it allowed for adequate compensation in general and for the applicant in particular.

b) Inter-American Court of Human Rights (IACtHR)

80. The Inter-American Court of Human Rights (IACtHR) has the most comprehensive and integral practice of the regional human rights courts when it comes to awarding reparations. In this sense, multiple important principles may stem from each of its

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144ECtHR, *Anguelova v. Bulgaria*, n°38361/97, 13 June 2002, para. 173, ECtHR, *Carabulea v. Romania*, n°45661/99, 13 July 2010, para. 176 (non-pecuniary damage of EUR 10,000 for the applicant having lost his brother, EUR 35,000 for the minor child of the deceased); *Vilkova v Bulgaria*, n°41488/98, 18 May 2000, paras. 94, 98, and pre-cited *Nachova v. Bulgaria*. In *Cobzaru v. Romania*, n°48254/99, 26 July 2007, though, the Court explicitly referred to the gravity of the ill-treatment of a Rom in custody, the number of injuries, and to an ethnic discrimination, even finding a violation of article 14 taken with articles 3 and 13 due to racist motives, paras. 100-101, 105. However, it awards the incomprehensibly low amount of EUR 8,000.

145ECtHR, *Carabulea v. Romania*, *ibid*, para. 176.


147Between EUR 1,000 for the opening of private letters (ECtHR, *Janauskas v. Lithuania*, n°59304/00, 24 February 2005) to amounts between EUR 35,000 to 60,000 in the Chechnyan as Turkish arbitrary killing cases, see above; see for further examples and sums converted in EUR: Meyer-Ladewig, *Europäische Konvention für Menschenrechte, Kommentar* (Baden-Baden, Nomos, 2011), Article 41, no. 20.

148See, for instance, the case of *Abuyeva*, cited above, no. 133, and *Ilasçu v. Moldova and Russia*, n° 48787/99, 08 July 2004 (EUR 190,000 to each applicant for arbitrary detention after acquittal, referring to the "extreme seriousness of the violation", para. 489, pecuniary and non-pecuniary damage), *Gongadze v Ukraine*, n°34056/02, 08 November 2005 (EUR 100,000 for killing of a journalist, pecuniary and non-pecuniary damages and costs) – but also EUR 75,000 for the refusal of a construction permit (*Frascino v Italy*, n°35227/97, 11 December 2003).

149ECtHR, *Broniowski v Poland*, no. 31443/96, Judgment, 22 June 2004, paras. 194,198, operative paras. 4-5.

150ECtHR, *Broniowski v Poland*, Friendly Settlement, 28 September 2005, paras. 41-44. The July 2005 Act promised compensation of 20% of the property’s value for Polish former residents of the area. The applicant received PLN 237,000, including the 20%, material damages, non-pecuniary damages for frustration and PLN 24,000 for expenses.
judgments. The following are some examples of the determinations the Court has made that have wilfully, or even unintentionally, resulted in the prioritising of certain beneficiaries.

81. For example, community customs have been made a priority factor when considering violations against indigenous groups, and also prioritising beneficiaries according to the gravity of the suffering they had to endure.

82. For example, in *Aloeboetoe et al v. Suriname* (1991), a group of approximately 70 maroons, during their journey from the capital city of Paramaribo, were halted at a military checkpoint; more than 20 men were beaten under suspicion of being part of a Commando (in presence of the remaining 50). Later, most of them were allowed to continue, except for 7 of them (including 1 minor), who were taken to a vehicle, then forced out of it and ordered to excavate. As one of them tried to run away, he was shot (he was found alive, but died later in a hospital); the remaining six were killed.\(^{151}\)

83. The State acknowledged its responsibility for the violations of the right to life, the right to humane treatment, the right to personal liberty, among others.\(^{152}\) When awarding reparations, the IACtHR conceded to the customs of the community and allowed all wives (in equality of conditions) of a single victim to be considered as successors and therefore, as beneficiaries of the reparations granted for material damages.\(^{153}\) Parents were considered dependants (except in the case of one victim),\(^{154}\) and the Court was prepared to include them as beneficiaries of compensation for material damages, but the proof presented was insufficient;\(^{155}\) they were, however, considered beneficiaries when it came to allocation of moral damages.\(^{156}\)

84. Also, regarding reparations for moral damages, one victim was awarded an additional 1/3 of the amount granted to the rest of the victims, given that he experienced greater suffering derived from his experience and agony.\(^{157}\) It is interesting to note that even though one of the victims was a minor, he did not receive additional compensation for moral damages in consideration of his particular vulnerability in this case.\(^{158}\)

85. On the other hand, the practice of the IACtHR has, more recently, been rather consistent in prioritising beneficiaries that are considered members of vulnerable groups, such as women and children. The IACtHR has also taken the opportunity to differentiate between the immediate family members of the victims and between the gravity, not only of the violations, but also of the consequences these violations have had on the victims.

86. For example, in the case of *Castro Castro Prison v. Peru* (2006), a disguised transfer operation of inmates (sentenced for terrorism or treason, and all allegedly members of the *Shining Path* guerrilla group) between penitentiaries was carried out in order to

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\(^{152}\) *Ibid.* Para. 22.


\(^{154}\) *Ibid.* Para. 76.

\(^{155}\) *Ibid.* Paras. 67, 69, 71 and 73.

\(^{156}\) *Ibid.* Paras. 76-77.


perpetrate a premeditated attack against their lives and integrity.\textsuperscript{159} The Court found violations of the rights to life, humane treatment, personal integrity, a fair trial and judicial protection, in connection with other violations of the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women.\textsuperscript{160}

87. Regarding compensation for material and moral damages, the distribution ordered by the Court was as follows: 50\% divided among the victim’s children and 50\% to the surviving spouse or permanent partner. In case the victim had no children or spouse/partner: 50\% would go to the victim’s parents (divided equally among them) and the other 50\% distributed equally among the victim’s siblings.\textsuperscript{161}

88. The same amount of compensation (USD $10,000) for pecuniary damages was awarded to the families of the deceased inmates and to those surviving inmates who were left with a partial permanent handicap affecting their ability to work. However, this amount was significantly increased (USD $25,000) for those surviving inmates who were left with a complete, permanent handicap making them unable to work.\textsuperscript{162}

89. As regards non-pecuniary damages, each of the 41 deceased victims received USD $50,000, and their next of kin received, either USD $10,000 (parents, spouse or permanent partner, and children) or USD $1,000 (siblings). Surviving victims with a complete permanent handicap received USD $20,000; with a partial permanent handicap received USD $12,000; with consequences that do not amount to a complete or partial permanent handicap, USD $8,000; and for each surviving victim found in none of the three previous categories, USD $4,000. An additional USD $5,000 was granted in favour of three women who were pregnant and had poor pre and postnatal health attention; an additional USD $30,000 was granted to a woman victim of rape; and, an additional USD $10,000 was granted to six women victims of sexual assault. For the next of kin of the victims of the right to humane treatment, the Court granted USD $1,500, amount which was increased by USD $500 (for a total of USD $2,000) when it came to the victim’s children who were under the age of 18.\textsuperscript{163}

90. Another example is the case of the \textit{Ituango Massacres v. Colombia} (2006), which involves the massacres in the communities of \textit{La Granja} and \textit{El Aro}. In May 1996, the community of Ituango was the object of roadblocks by the military with the purpose of monitoring all of the entrances to the town. In this context, the following month, about 22 paramilitaries entered the community of \textit{La Granja} and started carrying out selective executions.\textsuperscript{164} In \textit{El Aro}, between 22 October and 12 November 1997, a chain of selective executions, including one of a minor, was also carried out by paramilitaries.\textsuperscript{165} The State acknowledged its responsibility for the violations of the

\begin{flushleft}
\textsuperscript{160} Ibid. Operative paragraphs.
\textsuperscript{161} Ibid. Para. 421.
\textsuperscript{162} Ibid. Para. 424-425.
\textsuperscript{163} Ibid. Para. 433.
\textsuperscript{165} Ibid. Para. 125(57).
\end{flushleft}
right to life, to humane treatment, to property, and to personal liberty, all in relation with the obligation to respect rights.\textsuperscript{166}

91. When awarding reparations, for non-pecuniary damages, each of the 19 victims executed was granted USD $30,000; an additional USD $5,000 was granted to the victim who was a minor at the time of his death. The next of kin were granted USD $10,000 (parents, spouse or permanent partner, and children), and an additional USD $2,500 was granted to minor children of victims; siblings were awarded USD $1,500. There was also a possibility for these amounts (of the next of kin) to increase by USD $2,000 if people claimed (with the official identification and proof, before the competent State authorities) that they were children at the time of the facts.\textsuperscript{167}

92. In the case of the \textit{Mapiripán Massacre v. Colombia} (2005), the State acknowledged responsibility for the facts of the case, given that it showed a clear collusion between military authorities and paramilitary groups. On July 1997, a group of about 100 paramilitaries arrived to the community in military uniforms and with weapons reserved for the use of the State, and began intimidating, kidnapping, torturing and killing the inhabitants of the community.\textsuperscript{168} Although it was not possible to identify the exact number of victims, there were approximately 49, including, at least, two minors.\textsuperscript{169} The IACtHR found violations of the rights to personal liberty, to humane treatment, to life, to the rights of the child, and to the right of movement and residence, among others.\textsuperscript{170}

93. Regarding reparations, for non-pecuniary damages, each of the victims (identified or not) was granted USD $80,000; and, an additional USD $10,000 were granted to two victims who were minors at the time of the facts. As for the next of kin who personally suffered from the massacre, USD $50,000 were granted to parents, spouse or common-law spouse, and children; USD $8,500 for siblings; and an additional USD $5,000 for those who were minors at the time of the facts.\textsuperscript{171}

94. In the case of \textit{Pueblo Bello Massacre v. Colombia} (2006), a group of around 60 paramilitaries arrived at the community of Pueblo Bello with the objective of abducting a group of individuals who had allegedly collaborated with the guerrillas and whose names they had on a list.\textsuperscript{172} Some of those abducted were tortured and killed; some corpses were buried, but the whereabouts of others remained unknown.\textsuperscript{173} The IACtHR found violations of the rights to life, humane treatment, and personal liberty, all in relation to the obligation to respect rights.\textsuperscript{174}

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\textsuperscript{166}Ibid. Operative para. 1.
\textsuperscript{167}Ibid. Para. 390.
\textsuperscript{169}Ibid. Para. 96(48) and 96(51).
\textsuperscript{170}Ibid. Operative paragraphs.
\textsuperscript{171}Ibid. Para. 288(a) – 288(c)(iii).
\textsuperscript{173}Ibid. Paras. 95(39).-95(41).
\textsuperscript{174}Ibid. Operative paragraphs.
95. Regarding the award for reparations, for non-pecuniary damages, USD $30,000 was granted to the 37 victims of disappearance and the six who were deprived of their lives; with an additional USD $5,000 granted to the three victims who were minors at the time of the facts. Regarding the next of kin, USD $10,000 was awarded to the parents, wife or permanent companion and children of the disappeared victims, whereas only USD $8,000 was granted to the parents, wife or permanent companion and children of the victims deprived of their lives; and, USD $500 was granted to siblings of both, disappeared or life-deprived victims. These amounts were increased by USD $2,000 for the women next of kin who were pregnant at the time of the facts.175

c) Conclusions: Jurisprudence

96. While the ECHR is reticent to define clear criteria of prioritisation and focuses on the situation of the applicant himself and the nature of the violation, the jurisprudence of the IACtHR clearly prioritises the beneficiaries of the reparations it orders, depending on the violation in question (for example, death or injury), as well as the particular circumstances of the individuals in the cases (in the case of aggravated suffering). In its recent jurisprudence, an increased amount of compensation is awarded to particularly vulnerable victims, such as indigenous peoples (taking into consideration their community customs), children and women (in case they directly suffered aggravated circumstances specific to their condition as minors or women, or because they indirectly received a differentiated impact regarding the violations suffered by their immediate family members). Such a needs-based assessment would be in compliance with Rule 86 of the Rules of Procedure of the International Criminal Court.

IV. General Conclusions and Key Recommendations

1. This paper has illustrated different ways to prioritise reparations. In particular, it has looked at relevant experiences in domestic reparations programmes, jurisprudence and other international experiences. Whether through increased amounts of money or the provision of specific services, certain groups have been beneficiaries of more reparations than others in the midst of a post-conflict situation.

2. Given that the ICC faces international crimes that have affected multiple victims usually in conflict situations, prioritisation for the award of reparations seems to be necessary to respond to the challenges such situations pose. With this in mind, the following key recommendations contain some of the most important principles that have been used in the experiences under examination.

3. Reparations for international crimes under the jurisdiction of the International Criminal Court could encompass, as a general rule, all immediate members of the family of the direct victims: parents, spouse or permanent partner, children and siblings; and should also aim to include other dependents (whether financial or emotional) where applicable. Such general rule admits exceptions as when it is proven that there was no emotional bond between members of the immediate family.

175Ibid. Para. 258(a) – 258(c)(iv).
176Aloeboetoe et al. v. Suriname. Supra, no. 156. Para. 68.
4. The violent contextual nature of these violations also implies a significant impact on people’s decision to flee and/or relocate. With this in mind, refugees, internally displaced persons and family members living in exile should also be considered beneficiaries.

5. Because all societies are different and all conflicts originate in specific contextual circumstances, each of the examples mentioned above has presented a range of possible measures to be taken depending on the particular case. This being so, the parameters for prioritisation require to be adapted to the nature and character of the respective conflict/situation.

6. Even though every conflict situation is different, a common feature is the specific adverse impact suffered by certain vulnerable groups. Such is the case of indigenous peoples and rural populations, the economically disadvantaged, children (including former child soldiers), women, the elderly and the disabled. These groups, and any others who may be at a disadvantage from the rest of the population, should be given priority in the award of reparations. This should be done in a way that always takes due account of the specific circumstances of their vulnerability.

7. Many conflicts originate from historical and structural issues. In this sense, and as previously mentioned, in addressing the root causes of each situation, reparations should take into account these structural deficiencies and prior situations of discrimination (especially those based on gender, ethnicity, and economic status) and practice affirmative action in order to compensate for them.

2011. Para. 264(g). A cousin of the victim, not considered next of kin according to IACtHR jurisprudence, was considered a beneficiary of moral damages given the close relationship of affection between him and the victim.
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