Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms

Dr Luke Moffett
School of Law, Queen’s University Belfast
l.moffett@qub.ac.uk

Abstract
Reparations over the past few decades have become integral in responding to mass victimisation and conflict in international law and transitional justice. Although the development of reparations in transitional justice has been framed around abusive authoritarian regimes and repairing the harm suffered by civilians, such as in Latin America, there has been contentious reparation rulings by regional human rights courts in situations of internal armed conflict by recognising perpetrators and ‘terrorists’ as victims and awarding them reparations. Complex identities are particularly acute in situations of internal armed conflict, where protracted internal violence between the state and organised non-state groups, due to the political narratives in legitimatising the violence and victimisation of each ‘side’. This paper examines the construction of complex identities in reparation mechanisms and the context of recognising victims and perpetrators in transitional justice processes.

This paper explores the approach to these issues in a number of contexts to discern a way forward in traversing the complex landscape of reparations for victim-perpetrators. The paper tries to reconcile the more subjective state perspective and political limits of transitional justice, to the objective stance of international fora and obligations on states to provide reparations to a wider class of victims.

Introduction
Recognising who is a victim in the aftermath of mass violence and conflict can be politically controversial and polemic, owing to contested narratives of victimhood by different actors. The image of victims as ‘innocent’ is often used to deny victimhood to those who suffered, due to their background or conduct, or to legitimise violence against such individuals or groups. In reality individual identities in protracted armed conflicts and political violence can be more complex than the binary identities of victim and perpetrator, where individuals can be both victimised and victimiser over a period of time. This is only brought into sharper relief with the issue of reparations, which seek to acknowledge individuals as victims, who deserve a remedy made by

1 Mike Morrissey and Marie Smith, Northern Ireland after the Good Friday Agreement: Victims, Grievance and Blame, Pluto Press (2002), p4.
those responsible for their suffering. Reparations have increasingly become a normative part of transitional justice processes in focusing on remedying victims’ harm, complementing criminal trials which are more perpetrator focused. With the growing use of reparations to deal with collective violence, their remedial nature has come into conflict with political discourses of who is seen as deserving, threatening to derail fragile and long term peace processes, such as in Peru and Northern Ireland.

This paper begins by outlining how victimology has grappled with complex victims and the role of political discourses use victimhood to establish legitimacy and avoid responsibility. The second part of this paper discusses the theoretical basis of reparations, paying particular attention to its development in law, victimology and psychology. With these two parts in mind, the third section evaluates how complex victims have been included or excluded in reparation programmes in different contexts emerging from conflict. The final section evaluates alternative approaches in including complex victims in remedial or assistance programmes in the hope of finding a different approach in reconciling the victimisation of complex victims within their responsibility.

A. Conceiving complex victims

The term complex victim appreciates that not all victims are innocent, but can be responsible for causing harm to others or themselves. This analysis is not new, since its inception victimology has been concerned with understanding victims’ responsibility in their own victimisation. This positivist account of victimology analysed victims’ role in crime or proneness to victimisation, looking in particular at their actions, characteristics, and circumstances that provoked the perpetrator to commit an offence. However, this analysis failed to appreciate the impact of social structures upon victimisation, such as race, class, age, and gender, and resulted in ‘victim blaming’, in that the victim was at fault for causing their own suffering. More critical accounts of victimology have since examined the ‘role of the law and the state in the victimisation process as well as the potential for human actors both to sustain and to change the conditions under which they act.’ Critical victimology attempts to uncover victimisation which remains hidden or unrecognised, due to prevailing social factors, politics, or lack of interest in certain individuals or vulnerable groups. Through this perspective the concern for recognition and fair treatment of victims better reflects the relational or ‘lived reality’ of individuals and groups that suffer

---


5 Mawby and Walklate ibid., p177.

as a result of a crime. Perhaps a criticism of critical victimology is that it neglects the responsibility of victims in victimising others, due to concerns of victim blaming in feminist accounts which helped to shape the field. However, such concerns in domestic victimology may not capture the experience of victimhood in collective violence. This paper takes a nuanced victimological examination of complex victims, who are not just vulnerable objects victimised by others, but appreciates the context of such victimisation in light of their agency to change their circumstances and take responsibility for their actions.

Critical accounts of victimhood acknowledge the socio-political context that in the real world individuals are not always recognised as victims, owing to prevailing political or moral ‘labelling’ of who a victim should be and who deserves recognition. The victim label can bestow sympathy, praise, or benefits on an individual as it recognises that they have suffered. As such, Christie postulates the ‘ideal victim’ as society’s construction of what a victim should be. The ideal victim is innocent, vulnerable, very young or very old, carrying out a respectable endeavour, and a good citizen who has been attacked by a big, bad offender who is a stranger. This construction of the ‘innocent victim’ serves to contrast the ‘wicked’ perpetrator, insurgent, or terrorist. As with the term ‘victim’, such language for perpetrators can serve a political and moral purpose of dehumanising these individuals to distinguish them as evil, uncivilised, and deserving of punishment or reciprocal violence. This characterisation fits into retributive discourses, simplifying and distorting the occurrence of crimes and violations where such identities do not always exist. For those individuals denied recognition as victims because of their past actions or association, it may cause stigma, emotional trauma, and self-blame.

On the other hand there is a danger of individuals as ‘ideal victim’ to be represented as passive and vulnerable. This conceived vulnerability and passivity of victims can enable others to use victims politically, without considering their agency and autonomy to help themselves or contribute to wider political or legal processes.

The political construction of victimhood is equally utilised on the international stage in response to collective violence and conflict. The use of ‘innocent’ or ‘real’ identification of victims within conflict

---

9 David Miers, Taking the law into their own hands: victims as offenders, A. Crawford and J. Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice*, Ashgate: Aldershot (2000) 77-95, p78.
11 Ibid p19.
and post-conflict societies can perpetrate a very powerful moral conception of victimhood. Belligerents in conflicts can portray themselves as collective victims to benefit from the victim label and to be seen as the ‘good guys’, deserving of sympathy and support, and innocent of any crime. Such a perspective can drift into the dangerous waters of ‘moral relativism’, particularly with international crimes, whereby an individual or group can blame their situation, context or structural factors for committing such crimes, and as a result legitimise violence against individuals, impose collective guilt on groups and people, or deny recognition of certain victims. This is apparent in the ‘Troubles’ in Northern Ireland or the Israeli/Palestinian conflict, where victimisation is used by different actors to construct moral justification and legitimacy of their violence against the other side. Such construction of victimhood and legitimacy can leave little space for complex identities.

In practice collective violence can often be protracted and complex, preventing the identities of victim and perpetrator from fitting into neat, distinct morally acceptable categories. As Borer points out victims and perpetrators of collective violence are not homogenous, nor always diametrically opposed, but can coincide. The ‘messy’ reality of these situations can mean that there are complex identities of victim-perpetrators who can exist at the same time, such as child soldiers, or evolve over time by being victimised one day, but carrying out a retaliatory attack the next. This is not to mitigate their personal responsibility for such harm, nor to tarnish those victims who turn the other cheek and become ‘moral beacons’ in their community, but to understand the personal, social, and political context in which victimisation occurs. It is only through developing a ‘thicker’ multi-perspective of victimisation can we understand how to address such harms in terms of justice.

In understanding complex victims McAlinden identifies there can be a ‘continuum of offending’ where victims are coerced or cooperate to facilitate perpetrator violence to avoid further suffering themselves and/or to survive. By making victims complicit or collaborators in the victimisation process, it can have the effect of dehumanising them further. This is apparent with the Jews who were used as ‘special squads’ in Auschwitz to burn the bodies of those who were killed in the gas chambers, before later suffering later the same fate themselves. This ‘grey zone’ of identities

---

16 See Erica Bouris, Complex Political Victims, Kumarian (2007); and Morrissey and Smith n.1.
18 McEvoy and McConnachie n.13, p502.
20 Collective violence is used here to cover gross violations, crimes against humanity and genocide, which do arise to the intensity, organisational or territorial requirements of armed conflict under international humanitarian law. Borer.
21 McEvoy and McConnachie n.13, p494.
24 McAlinden n.15, p186.
counters the simplicity of perpetrators and victims always being in two distinct blocs. A grey zone of identities can be incongruent with moral conceptions or political narratives of a conflict, which can shape how such violence is redressed in transitional justice measures. Such binary construction of victimisation can gloss over issues of responsibility, such as with child soldiers, who are forced to commit atrocities, but may not fit into such a neat category of ‘innocent’ where they rise to a position of command, such as the current indictment by the International Criminal Court against Dominic Ongwen, a senior commander in the Lord’s Resistance Army.

This paper takes a critical approach by recognising such individuals as complex victims to avoid acknowledgement becoming a source of victimisation, but also appreciates the responsibility of such individuals and a more ‘thicker’ understanding of complex victims in delivering appropriate reparations. Although such theorisation of complex victims is likely to only apply to a select category of individuals, such an approach is merited as by not recognising them it may lead to three problems: (1) contributing to narratives that they deserved such suffering or such violence was justified and further entrenching victim stereotypes; (2) preventing the application of reparations to vulnerable or marginalised groups, weakening the purpose of reparations to effectively remedy harm; and (3) undermining the long term prospects of peace by leaving such suffering unaccounted and unresolved.

For the purposes of this paper the complex identity of victim-perpetrator (complex victims) refers to individuals who are members of armed, paramilitary or terrorist groups, or state forces which commit political violence, but have been victimised through identifiable gross violations of human rights law or international crimes, such as disappearances, extrajudicial killings, sexual violence, torture, serious injured, or ill-treatment caused by other actors. These crimes are distinguished due to their *jus cogens* nature that they are considered in international customary law as objectively illegal and can never be justified in their commission, no matter the background or association of an individual.

It is only through recognising such victimisation in a non-discriminatory way can the objectively wrongful nature of such violence be enforced through accountability mechanisms. Reparations are a key justice process in such issues as they acknowledging the suffering caused by offering different

27 McEvoy and McConnachie n.7, p533. See Erin K. Baines, Complex Political Perpetrators: Reflections on Dominic Ongwen, *Journal of Modern African Studies* 47(2) (2009) 163–191. Domestic crimes can be distinguished from international ones, which transcend national borders and state sovereignty as a concern for all states and the international community, as by allowing impunity for such crimes can have the potential to destabilise international peace and security. International crimes themselves can be characterised by their mass scale, ideologically driven, state action or inaction, impunity and severity of crimes upon victims over time. In other words, international crimes are not simply a single offence, but multiple violations with on-going victimisation on a mass scale involving numerous perpetrators, groups and institutions as part of some organised plan or policy. Reference here to collective violence generally refers to international crimes, but due to jurisdictional and definition limits with these crimes also includes gross violations of human rights. See Luke Moffett, *Justice for Victims before the International Criminal Court*, (Routledge 2014), p10-12.
28 Bouris n.16, p75.
remedial measures by responsible actors to repair the harm caused, it is worth discussing its theoretical basis in more detail.

B. Theorising reparations for complex victims

Reparations draw from legal, psychological, and victimological theorisation. In international law reparations are intended to ‘as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’

This reparative principle seeks to return the victim to the status quo ante (original position) through  \textit{restitutio in integrum} (returning to the victim all they have lost). This is a form of rectificatory or corrective justice, which attempts to restore the equality between the injured and responsible party through imposing a proportional penalty on the perpetrator commensurate to the harm caused so as to benefit the injured party. Human rights law has over the past few decades developed five types of reparations of restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition, as appropriate in effectively remedying gross violations of human rights.

In other disciplines reparations have been conceived as a special form of justice, so-called reparative justice, which is more broadly construed to respond to the needs of victims in remedying or repairing their harm or loss, in contrast to retributive, corrective, or distributive justice theorisation. From a psychology perspective, reparative justice is defined as the whole justice experience from the courtroom to institutional reform in healing the harm and marginalisation suffered by a victim at both the individual and societal levels. Mani combines both the legal and psychological basis for reparations as reparative justice, which seeks to repair the ‘legal injustice’ such as injury or loss of employment, and the ‘psychological injustice’ of victimisation, trauma and the loss of dignity. Hamber suggest that reparations are not just a justice outcome, but an important \textit{process} for victims to have their suffering acknowledged by those responsible, rebuilding their civic trust and social belonging after ‘extreme political trauma’. This is generally reflected by victimologists who define reparative justice within the parameters of procedural and substantive aspects. Procedural justice pertains to

---

sensitive treatment of victims, as well as their access to, participation in, and information on reparation mechanisms, with the substantive aspect including a range of appropriate measures to repair the individual and societal harm.\textsuperscript{38} 

This inter-disciplinary understanding of reparative justice is echoed in soft law international norms such as the 2005 UN 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.\textsuperscript{39} Accordingly, reparations in theoretical terms have three important components: (1) public acknowledgement of the harm; (2) made by those responsible; and (3) appropriate and proportional remedies.\textsuperscript{40} These components broadly correspond to addressing trauma in psychiatry, as Herman states,

Sharing the traumatic experience with others is a precondition for the restitution of a sense of a meaningful world...Restoration of the breach between the traumatized person and the community depends, first, upon public acknowledgement of the traumatic event and, second, upon some form of community action. Once it is publicly recognized that a person has been harmed, the community must take action to assign responsibility for the harm and to repair the injury. These two response – recognition and restitution – are necessary to rebuild the survivor’s sense of order and justice.\textsuperscript{41}

The three components of reparations fit into notions of accountability, in that individual or organisation can be held to account for their conduct and face a sanction for violating their obligations.\textsuperscript{42} Public acknowledgement of a victim’s harm through reparations can establish they are not responsible for their suffering, asserting their dignity and ability to seek redress.\textsuperscript{43} Responsibility implicitly defines harm caused to the victim as illegal or a violation, acknowledging the individual was not responsible for their suffering, reaffirming the law and enabling the responsible actor to atone for their wrongdoing.\textsuperscript{44} The final component of effective remedy seeks to provide appropriate reparations that can as far as possible wipe out the consequences of the illegal act.\textsuperscript{45} It is worth now turning to consider how these elements are constructed in the aftermath of collective violence in addressing complex victims.

\textsuperscript{39} A/RES/60/147, (UNBPG).
\textsuperscript{40} See Moffett n.27; and Claire Moon, ‘Who’ll Pay Reparations on My Soul?’ Compensation, Social Control and Social Suffering, Social and Legal Studies 21(2) (2012) 187-199, p190.
\textsuperscript{41} Judith L. Herman, Trauma and Recovery: From Domestic Abuse to Political Terror, River Oram Press (1994), p70.
\textsuperscript{45} Chorzow Factory, para.125.
C. Constructing reparations for complex victims in times of transition

Reparations are an important part of many transitional justice processes, both in providing tangible remedies to victims of atrocities and to balance concessions and demobilisation packages made to combatants.\textsuperscript{46} For victims reparations are important in acknowledging and remedying their suffering, as well as improving their quality of life.\textsuperscript{47} Given that transitional justice has been traditionally rooted in accountability, it can also include other goals of reconciliation and peace building, which can mask tensions between such purposes.\textsuperscript{48} Reparations as amalgamation of accountability and reconciliation can complement other processes, but can also be contentious owing to competing demands. Criminal trials alone may not ensure that every perpetrator is held to account, owing to issues over sufficient evidence and cost, meaning that not every victim will have their day in court. Truth commissions while offering some comfort to victims in acknowledging a historical account of the past, do not by themselves offer tangible outcomes that can remedy the specific harm caused to them and improve their quality of life. Reparations can complement such processes and others, such as DDR, by offering redress to those most affected by violence as well as those responsible at the individual and institutional level contributing to the remedy, reflecting reparative justice. In turn, reparations are not an exclusive means to address past violations or determine responsibility, but need to be complemented with other processes, such as truth commissions and criminal trials, which can contribute to unearth responsible actors and suffering.

Reparations in countries undergoing transition are not perfect. Such programmes can be distinguished as a political project by managing different political discourses and distributive justice concerns, such as maximising benefits to society through the allocation of resources in the aftermath of collective violence.\textsuperscript{49} As Teitel suggests, the harm caused to individuals and society is ‘potentially limitless’, with those who have suffered political persecution being a more appropriate determiner.\textsuperscript{50} Some countries tend to prioritise certain suffering over others, on the basis of using resources efficiently when adopting reparations programmes. Most programmes concentrate on those vulnerable individuals and groups who suffered and continue to suffer from the physical, psychological or economic consequences of gross violations of human rights, such as disappearances, extrajudicial executions, sexual violence, torture, and serious injuries.\textsuperscript{51} With finite resources a state cannot remedy the suffering

\textsuperscript{49} Pablo de Greiff, Justice and Reparations, in P. de Greiff (ed.) \textit{The Handbook of Reparations}, (OUP 2006), 451-477, p454.
\textsuperscript{50} Ruti Teitel, \textit{Transitional Justice}, (OUP 2002), p134.
of all victims due to economic limitations in terms of cost and time, but also political restraints in recognising victims.\textsuperscript{52}

Determining who can claim reparations in countries which have experienced mass violence is a politically fraught process. The mass scale of victimisation caused by collective violence raises logistical challenges in how beneficiaries can be demarcated so as to ensure that a reparation mechanism is effective and meaningful to them. This evinces Veitch’s asymmetrical nature of law that it is unable to effectively hold all those responsible to account for the mass suffering caused.\textsuperscript{53} As a result, the law instead ‘organises irresponsibility’ enabling contested notions of victimhood to prevail by prioritising responses to certain victims over others. The development of legal rules and institutions for reparations can also act as a form of social control of suffering, rather than holding those responsible to account or acknowledging all suffering.\textsuperscript{54} This was apparent in the case of Argentina, where reparations were considered ‘blood money’ by the Madres de Plaza de Mayo as a substitute for justice and truth processes. As Moon points out the victims’ acceptance of reparations would have to embrace the government’s narrative of the past of the ‘two devils’ of state and guerrilla violence, legitimising the state’s use of torture and disappearances.\textsuperscript{55} Given the scale of collective violence and the contested political narratives, providing reparations can be challenging to ‘innocent’ victims, never mind complex ones. In light of the economic and political constraints surrounding reparations, complex victims are likely to be the first excluded.

The issue of complex victims has not really featured much within transitional justice theorisation of reparations. This can be partly explained on the basis that many countries which establish reparation programmes are based on atrocities committed by the former authoritarian regime, such as in Latin American and South Africa. This dominance of state abuses has pervaded the theorising of reparations, meaning that more complex victimisation by both state and non-state actors has been neglected. Moreover, the state-centred nature of human rights law has dominated the field of reparations, being concerned with the responsibility of the state to meet its international obligations under such treaties to its citizens. While a human rights approach, discussed further below, does promote non-discrimination for gross violations, its focus on the state leaves little space for horizontal or overlapping responsibility of members of non-state organisations. Determining the responsibility for state abuses is easier to address, as it is an anonymous identity, civilians are generally acknowledged as victims.\textsuperscript{56} Those responsible state forces are often dealt with through generous state demobilisation and/or pensions, depending on whether the country can exclude those who were convicted for crimes. That said, there remains challenges in providing reparations to victims. The following sub-section

\textsuperscript{52} Huyse n.19, p58.
\textsuperscript{54} See Moon n.40.
\textsuperscript{55} Moon, ibid., p194.
\textsuperscript{56} Huyse n.19, p62.
discusses the political contention around reparations for complex victims, before moving onto examine in the subsequent sub-section how different context have tried to deal with the issue.

1. Reparations for innocent and complex victims
The latent nature of complex victims in the transitional justice reparations literature can be explained by them coming into conflict with demands of other victims or the public. Victim-perpetrators are often excluded from reparations on the grounds of avoiding ‘moral equivalence’ with innocent victims. In the sense that complex victims should be denied access to reparations as they took up arms against their fellow country men and women, thereby contrary to the ideal victim of being a good citizen and ‘innocent’ of any wrongdoing. This distinction may also be a means for such ‘innocent’ victims to find some sort of order in the aftermath of such traumatic experience that reparations validate their blamelessness in their suffering, and maintain the myopic view of the wrongfulness of a perpetrator.57 Therefore a ‘hierarchy of victims’ can arise, with those ‘innocent’ or ‘real’ victims prioritised to facilitate political narratives of blame and innocence during the conflict.58 Such moral arguments can feed victim competition with each other for recognition, material resources or symbolic gestures, such as monuments, so as exclude complex victims as undeserving.59 Engaging in arguments about moral equivalence and hierarchies of victims, politicises the nature of suffering, undermining individuals’ personal loss and the effectiveness of reparations to remedy harm.60 Instead of vertical ‘hierarchies’ of victimhood, Rombouts et al. suggest it is more appropriate to conceptualise suffering horizontally to allow differentiation, without denying recognition of certain individuals, groups, or characteristics.61

There is a danger in theorising reparations and implementing them in practice for ‘ideal victims’, it may exclude those complex victims who have suffered from comparable gross violations, yet their suffering remains unacknowledged thereby allowing impunity for such crimes against certain individuals, undermining the *jus cogens* nature of such violations. Similarly if only ‘ideal victims’ are dealt with through reparations mechanisms and perpetrators through demobilisation programmes and/or criminal processes, it may further homogenise both groups, legally categorising them into opposing entities, which could inhibit reconciliation and sustainable peace. Such a simplistic legal typology may fail to reflect the reality of individuals’ lived experience where over time they could traverse both identities, or obtain other roles, such as peace maker.

Complex victims are different from ‘innocent’ victims in that they are responsible for victimising others. This requires a more complex approach in reconciling their responsibility with acknowledging their victimisation. To ignore their responsibility perpetuates a universal definition of

57 See Herman n.41.
58 See Bouris n.16; and McEvoy and McConnachie n.7, p532.
59 Huyse n.19, p64.
victimhood of ‘we are all victims’ dilutes the personal, traumatic, and continuing suffering of many individuals. Morrissey and Smyth suggest that such universalistic definitions of victimhood of ‘we are all victims’ has the effect of allowing those responsible to escape their guilt or shame, and ‘promote a culture of powerlessness and undifferentiated chaos.’ Furthermore in relation to reparations, if everyone is considered a victim, such a broad definition can inhibit efforts to identify those most in need and who continue to suffer from the effects of violence. The risk with complex victims is by recognising perpetrators as victims it could be used to legitimise their violence against others and avoid their responsibility in victimising others. That said acknowledging all those who suffer, including members of armed groups, for the purpose of victim reparation, may divest such individuals of their agency, political participation, and responsibility by framing their role in the conflict in terms of victimisation and passivity, requiring a more nuanced approach. Accordingly the purpose of this paper is to explore how a more nuanced picture of acknowledgement and responsibility can be developed in reparation programmes to respond to complex victimisation in periods of transition, without diluting the meaning of victimhood and the remedial nature of reparations.

2. Reconciling acknowledgement and responsibility of complex victims
Recognising complex victims as beneficiaries and responsible actors for reparations has to generally fit into the transitional political project. Where complex victims are able to access reparations it is seen to be congruent to the dominant political narrative of the wrongfulness of the state’s actions, such as in Chile. The dominant political narrative of reconciliation can promote that no distinction is made between victims, such as in Sierra Leone Truth and Reconciliation Commission focusing reparations on those who suffered the most. In Argentina and Brazil reparations were legally framed around human rights violations committed by state actors, thereby automatically excluding victims of non-state actors from the outset. That said violence by non-state actors in Argentina and Brazil was diminutive in comparison to atrocities committed by state forces. The rest of this section discusses how complex victims have been included and excluded from reparation programmes in situations closer to internal armed conflict in the four contexts of South Africa, Colombia, Peru and Northern Ireland; with the following section discussing alternative approaches.

In South Africa the promotion of reconciliation and the end of apartheid defined victims broadly to include those who suffered harm from gross violations of human rights or an act associated with a political objective for which an amnesty was granted. That said in general terms there was strong

62 Morrissey and Smyth n.1, p4; and Huyse n.19, p62.
63 Morrissey and Smyth n.1, p7.
64 Ibid.
67 TRC Report Vol.II, Chapter 4, paras.69-70.
68 Argentina (Laws 24,043, 24,441, and 25,914); and in Brazil (Laws 9,140 and 10,559).
69 Section 1, Promotion of National Unity and Reconciliation Act 34 of 1995.
distinctions in dichotomising perpetrators and victims, with the former to be dealt through amnesties and the latter with reparations. Borer and others have highlighted that this dichotomy did not capture the composite grey zone of identities, nor ‘perpetrators [who] are simultaneously victims’. Despite the broad definition of victimisation, numerous victims were excluded from reparations, in particular those who were victimised by other violations not falling with the defined gross violations of human rights, harm suffered by acts committed by perpetrators not given an amnesty, or did not amount to a ‘political objective’. Nevertheless a number of complex victims were recommended by the TRC for reparations. By way of example, in the case of the three AWB members who were murdered by a police officer (who received an amnesty) in Mafikeng in March 1994, the family members of the deceased were recognised as victims and referred to the Reparations and Rehabilitation Committee for consideration. The picture of victimisation is further clouded by the exclusion of innocent individuals who were wrongly convicted under the apartheid legal system, but were ineligible for amnesty or reparations. A Special Pension Fund was set up to benefit members of the state and liberation groups, such as the South African Defence Forces, Umkhonoto we Sizwe and the Azanian People’s Liberation Army, on the basis of the sacrifices such forces made in the establishment of democracy in South Africa. However, the pension board in determining awards could take into account the individual’s role and motive in a political offence, and its nature and gravity on state and non-state actors.

In Colombia, the negotiations around the demobilisation and disarmament of paramilitaries resulted in the 2005 Justice and Peace Law. However, under the 2005 Law victimhood and primary responsibility for reparations was constructed around crimes committed by illegal armed groups,

---

71 Mandani n.2.
72 Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement) a far right paramilitary Afrikaner group.
75 Recognising that members did not join liberation movements for financial compensation, but that they were prevented from accumulating a work pension. Some members of MK believed that victims who ‘did not fight’ did not deserve compensation. Lovell Fernandez, Reparations policy in South Africa for the victims of apartheid, Law, Democracy and Development 3(2) (1999), 209-222, p214. Section 189(1) of the Interim South African Constitution (No.200 of 1993), s.1, Government Employees Pension Law 1996 (No.21 of 1996), and Special Pensions Act 1996 (No. 69 of 1996). The Special Pension was complemented by the Demobilisation Act (No.99 of 1996), which provided additional demobilisation packages to those who were unable or unwilling to join the National Defence Forces. See Lephophotho Mashike, ‘Some of us know nothing except military skills’: South Africa's former guerrilla combatants, in S. Buhlungu, J. Daniel, and R. Southall (eds.), State of the Nation: South Africa 2007, 351-378.
76 S.1(2), Special Pensions Act 1996.
77 For past negotiations with rebel groups see Arturo Carrillo, Truth, Justice, and Reparations in Colombia, in V.M. Bouvier (ed.), Colombia: Building Peace in a Time of War, 133-156.
avoiding the responsibility of the state in atrocities. The Constitutional Court also amended the 2005 Law to include any member of illegal armed groups to be responsible for reparations for crimes and violations committed by such groups. It was only a number of years later through pressure of victim groups that the Colombian government through the 2011 Victims and Land Restitution Law that claims could be made against state forces. That said the 2011 Law excludes members of illegal groups from claiming reparations, despite suffering from gross violations of human rights, in order to deny the legitimacy of their struggle. Children or minors in such groups do however have access to reparations if they are minors at the time of demobilisation. Furthermore, family members and dependents of members of non-state armed groups are able to claim reparations as direct victims of violations, but not as indirect victimisation where violations are committed against members of armed groups. This is in contrast to members of the security forces who are recognised as victims with access to reparations, without any distinction with those who are responsible for committing violations. For those individuals killed by state forces, a criminal investigation needs to be completed that the person was not a member of an illegal armed group to claim reparations. As Amnesty International point out given that these investigations rarely reach a conclusion, it will have the effect of excluding numerous victims from reparations. The current negotiations between FARC and the Colombian government in Havana have indicated that FARC as a group will provide a reparations fund for those victimised with the group, but for the government to provide redress to members and families of those harmed by state forces.

In Peru, while reparations have been developed and implemented in recent years, controversy remains around allowing complex victims to claim them. Reparations were recommended through the Peruvian Truth and Reconciliation Commission (CVR), which have been implemented by the Comprehensive Reparation Programme (PIR). The CVR defined victims broadly to include those who suffered human rights violations, thereby embracing individuals who belonged to ‘subversive’ non-state groups. However, the CVR excluded members of subversive groups who suffered harm in armed clashes from reparations, as they took up arms against the democratic government, and were subjected to legitimate force by the state. As such, they were ‘victims, but not beneficiaries’.

---

78 Reparations are defined under Article 8 to include restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition. La Ley de Justicia y Paz, Ley 975 de 2005. Carrillo ibid., p154.
79 Gusavo Gallón y otros, Corte Constitucional C-370/2006, 18 May 2006, para.6.2.4.4.7-6.2.4.4.13.
81 Article 3(5), Ley de Víctimas y Restitución de Tierras, Ley (2011).
82 Article 3(2), Ley de Víctimas y Restitución de Tierras, Ley (2011).
83 Ibid.
84 Article 3(1), Ley de Víctimas y Restitución de Tierras, Ley (2011).
86 We take responsibility for victim reparations: FARC, *Colombia Reports*, 13 August 2014.
87 CVR Vol. IX, p149 and 153; and Rebecca K. Root, *Transitional Justice in Peru*, Palgrave MacMillan (2012), p131, quoting Jairo Rivas, technical secretary of the official Registry of Victims (*Registro Único de Víctimas*, or RUV). The Shining Path was found by the Peruvian Truth and Reconciliation Commission of being responsible
reasoning is compliant with domestic and international law on the use of force and human rights, it presupposed that such force was legitimate. Furthermore, such presumption on the legitimacy of state violence allows state forces to be included as ‘victims’ in reparation programmes on the basis that they were protecting the community, despite documented widespread and systematic human rights abuses. This distinction between state and non-state actors is present in the PIR reparation scheme. The PIR scheme offers both individual and collective reparations, but the delivery of individual reparations has been delayed to identify and exclude members of illegal armed groups. It has taken years to screen applicants to avoid members of subversive groups benefitting from reparations. Nevertheless this approach risks excluding many individuals in Peru who were wrongly convicted of membership of illegal armed groups such as the Shining Path, but allow those who were never identified to access reparations. Such a broad distinction also prevents vulnerable individuals within such communities to access an effective remedy, who did not have the freedom or capacity for the violence they committed, such as children who were members of illegal groups at the time.

In contrast to these contexts, discussion on reparations in Northern Ireland in dealing with the past have been virtually non-existent, given the contested nature of which victims should be acknowledged and who is responsible, with greater attention on truth and justice. In 2009 the Consultative Group on the Past (CGP) was established to find solutions to dealing with past in Northern Ireland. The final report of the CGP recognising the shortcomings of compensation for the harm caused by the conflict, and recommended that a ‘one-off ex-gratia recognition payment’ of £12,000 be paid to the relatives of those killed during the conflict, to acknowledge the loss they have endured. The language of ‘ex-gratia’ is important, as it implies that such a payment is charitable, rather than based on any legal obligation. Nonetheless, this one recommendation proved politically controversial, as family members of terrorists who were killed would receive money, it resulted in the whole report being rejected. More recent proposals of a pension for those severely injured during the Troubles and their carers, have been appropriated by some politicians wanting to ensure that only ‘innocent’ victims can avail of the pension, despite the serious suffering of complex victims and the likelihood that only a handful of them would be eligible. More problematic in Northern Ireland is that these proposals are

for 46% of those killed or disappeared, with the smaller Túpac Amaru Revolutionary Army (MRTA) were responsible for 1.5% of deaths. CVR Report, Vol. VIII.
89 See Root ibid., p134.
90 Ibid., p136.
91 Some 40% of those forcible recruited by the Shining Path being under the age of 18. Root ibid., p133.
93 Report of the Consultative Group on the Past (2009), p92. A similar payment was made by the Irish government through their Remembrance Commission’s Acknowledgement Payment.
based on discretionary charity and moral concern, rather than as a right to reparations involving a legal entitlement to a remedy. Such proposals stand in stark contrast to demobilisation packages and damages paid to members of the security forces, again applied without any distinction as in the Colombian and Peruvian contexts.⁹⁵

In these different contexts we can see that who is acknowledged as a victim is politically contested. It is apparent in the Northern Ireland context that the discourse of victimhood and innocence is used by elites to advance their political agenda and competition with the other side by seizing the apparent moral high ground. Such exclusion of complex victims has not been so explicit in other contexts, where instead their suffering has been recognised, but given their responsibility in victimising others they are seen as not deserving to benefit from reparations, such as the case of Peru. That said a more nuanced picture emerges in the distinction between complex victims and their family members (indirect victims). In the context of Colombia and South Africa, indirect victims are allowed to claim reparations for a complex victim who is killed, despite if they were instead alive and tortured or seriously injured they would be excluded. Such a distinction reflects the responsibility of the complex victim to exclude their access to redress, which does not extend to their family members.

In terms of responsibility there are two different approaches. The South African case represents a more unified picture of responsibility, with amnesty for individuals, the state assumes responsibility for reparations, reflecting a wider discourse on reconciliation.⁹⁶ However such a myopic view of responsibility is a legal fiction which covers up the messy reality of the complex web of victimisation and responsibility, which characterises collective violence. This narrow construction of responsibility could undermine the legitimacy and acceptance of reparations by some victims. In contrast the Colombian experience represents a more multifaceted approach to responsibility, where the state, armed groups and individual can be held responsible for reparations. A similar approach has been followed in the mobile military courts in the DRC, where government soldiers, the state and local militias have been found jointly responsible for reparations to victims.⁹⁷ This more composite approach to responsibility better embraces the lived experienced of collective violence and is better positioned to support a more accurate accountability process. That said when it comes to excluding complex victims from reparations on the basis of their responsibility it endangers slowing down the process and excluding numerous other victims who suffer from gross violations of human rights.

⁹⁶ See Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, (CCT17/96) [1996] ZACC 16. The Special Pension fund potentially could exclude complex victims, but does not make them responsible for provide reparations to those they victimised.
The distinction of responsibility is tied to underlying discourses of legitimacy, where by state security forces are still able to claim reparations, with no examination of their responsibility in victimising others. Such a construct maintains the ‘order’ of state forces, by minimising the wrongfulness of state. As situations of internal armed conflict, it stands in contrast to reparations under authoritarian regimes. In the South African case the inclusion of liberation groups reflects the dominant political discourse allowing certain complex victims to ‘benefit’ from reparation measures. The general distinction between ‘ideal victims’ of innocent civilians and state forces serving their community who are victimised and able to claim reparations, against the suffering of complex victims, reinforces a hierarchy of victims, where some suffering is deserved and there is no equal value for human life, dignity, and personal integrity.98 The broad brush of responsibility to exclude acknowledgement of the serious suffering of such individuals, paints over complex identities and experiences of individuals during collective violence. This represents a ‘double-blind’, which excludes complex victims from reparations on the basis of their responsibility, yet includes state forces without examining their culpability. Accordingly, by excluding complex victims a legal fiction is created where only certain victims in the official narrative of the conflict deserve to benefit from reparations. Perhaps rather than exclusion, alternative perspectives could be considered to learn how responsibility and victimisation of complex victims can be reconciled.

D. Alternative perspectives

1. Human Rights and Reparations

Reparations have long been associated in human rights law a remedial measures to ‘promote justice by redress’.99 The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations (UNBPG) represents the main international norms on reparations, although it is a soft law declaratory document. It defines victim broadly as,

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights,… through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.100

Principle 25 further stipulates that reparations should be applied ‘without any discrimination of any kind or on any ground, without exception.’ Shelton elaborates that the ‘character of the victim should not be considered because it is irrelevant to the wrong and to the remedy, and implies a value judgement

98 Garcia-Godos n.65, p79.
99 Principle 15, A/RES/60/147.
on the worth of an individual that has nothing to with the injury suffered." To do otherwise would undermine the objectivity of such a determination by basing such decisions on moral, rather than legal responsibility. This principle of ‘non-discrimination’ is consistent with cases of torture, whereby the prohibition of such ill-treatment is absolute, no matter the political context or character of the individual. As such, complex victims who suffer from gross violations of human rights are human beings who have a right to reparations, no matter their responsibility, which should not prevent or bar their access to a remedy.

Although the non-discrimination principle is prevalent in contemporary human rights law for complex victims of gross violations, this has not always been the case. The European Court of Human Rights has distinguished complex victims from claiming reparations in earlier cases. In the *McCann and others v United Kingdom* three members of the IRA were killed by British special forces in Gibraltar, who were planning to detonate a bomb at a military parade. The Court found that while the use of force was not ‘absolutely necessary’ and their right to life had been violated, the families of those killed were not entitled to reparations as the Court stated itself, ‘having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award.’ In more recent decisions the Court has not distinguished complex victims, instead focusing on whether the state carried out an effective investigation, rather than a factual analysis of whether individuals’ substantive right to life had been violated. Although not entirely avoiding the context of violations and moving to remedying individual suffering, the Court leaves the door open to consider the actions and responsibility of complex victims, stating that, it [is not] the Court’s role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.

In contrast, the Inter-American Court of Human Rights has followed the non-discrimination principle, as apparent in a number of cases involving Peruvian state forces violating the rights of members of non-state armed groups, such as the Shining Path. In one of the most notable cases, *Miguel Castro Castro Prison v Peru* state forces attacked a high security prison housing Shining Path inmates, killing 41 and injuring 175 others, as well as failing to conduct an effective investigation into extra-

---

101 Shelton n.31, p72.  
103 *Selmouni v France*, (Application no. 25803/94, 28 July 1999) para.95; and *Ireland v United Kingdom*, (Application no 5310/71, 13 December 1977), para.163  
104 *McCann and other v the United Kingdom*, (Application no. 18984/91) 27 September 1995, para.219.  
105 For instance see *Kelly and Others v United Kingdom*, Application no. 30054/96, 4 May 2001.  
106 *Varnava and others v Turkey*, (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), 18 September 2009, para.224; and *Al-Skeini and Others v the United Kingdom*, (Application no. 55721/07), 7 July 2011, para.182.
judicial executions and ill-treatment.\textsuperscript{107} While the Peruvian government partially acknowledged its responsibility for those killed and injured during the attack, it was unwilling to recognise those members of the Shining Path as victims for the purposes of reparation. It instead requested the Inter-American Court to place such violations in the ‘context’ of an ‘extremely serious situation of internal conflict’, with reparations to be determined in line with domestic policies.\textsuperscript{108} However, the Court rejected these claims and awarded substantial compensation to victims and their next of kin, as well as for the state to effectively investigate the violations, provide medical and psychological assistance, publicly acknowledge the state’s responsibility through a public ceremony broadcasted by the media, include the names of those killed in the prison on the ‘Eye that Cries’ memorial, as well as to educate state forces on human rights norms to prevent future violations.\textsuperscript{109}

In subsequent proceedings on interpretation of the judgment in \textit{Castro Castro Prison}, the Peruvian government sought to push their point that the victims as imprisoned members of the Shining Path were responsible for victimising Peruvians and the Court should respect the memory of those they victimised. Furthermore, the government suggested that by awarding reparations to the victims it would allow the Shining Path to continue its subversive campaign; instead such reparation should be off-set as a debt to those they had victimised.\textsuperscript{110} Nonetheless, the Court refused to reduce or prevent reparations to the victims, on the basis that as a human rights court it lacked the jurisdiction to determine the nature and aggravating circumstances of the criminal acts of the victim, distinguishing it from a criminal court and determining individual criminal responsibility.\textsuperscript{111} Instead the jurisdiction of the Court was to examine the international responsibility of the Peruvian state in fulfilling its obligations under the American Convention, which could not be mitigated by the actions of the victims, owing to the serious nature of the violations. This reflects the shortcomings of a human rights court in dealing with internal armed conflicts, which go beyond the responsibility of the state and the handful of victims that are able to come before such proceedings to seek redress.

Human rights jurisprudence is important in two respects in how reparations can capture a just solution in dealing with complex victims. Firstly human rights courts generally follow the principle of non-discrimination when it comes to holding state responsible for violating human rights obligations. Thus regional human rights courts take a more objective analysis. However, the right to reparation as vindication to individuals who have been subjected to gross human rights violations, is problematic in applying to members of non-state armed groups who are victimised by the state. This leads to the second

\textsuperscript{109} $60,000 for those 41 individuals killed, and $22,000-$45,000 for those survivors who were injured. \textit{Castro Castro Prison} ibid., paras.410-469.
\textsuperscript{111} Ibid. para.40.
issue that human rights courts struggle with their one-dimensional jurisdictional reach as enforcing the obligations of the state, preventing it from examining the responsibility of private individuals and groups. This inability to distinguish the responsibility of complex victims is likely to cause political strife, as only a handful of victims are able to access regional human rights courts, causing an imbalance between those before the court and the majority of ‘victims’ reliant on national mechanisms. Unsurprisingly reparations determined in regional human rights courts in times of internal armed conflict can have a significant political impact on the domestic transitional justice landscape, as in the case of Peru. Ultimately the human rights approach by itself does not provide a complete picture, but rather captures a microcosm of responsibility and victimisation, instead of the larger complex web of victimisation and responsibility that characterises collective violence. These two points of human rights do represent important moral values inherent in rights based approaches. In the sense that individuals who are subjected to gross violations of human rights or international crimes should have a right to an effective remedy, no matter their conduct. However, for those they victimised they have a similar right to remedy against those who victimised them whether it be the individual, group or state.

2. Development aid, services and collective reparations as a workaround?

In contrast to individual rights and awards of reparations in human rights law, states have grouped victims together to provide more general assistance and remedial programmes to them, in part to maximise resources and to avoid issues of moral equivalence with complex victims. Development aid, services and collective reparations have been promoted in the context of collective violence to provide assistance and support to victims. These more collective responses can avoid questions of benefitting complex victims as they benefit not just victims, but everyone in a particular area. However, such an approach can dilute the reparative effect of reparations by removing responsibility from the equation and widening the scope of application to those who have not been victimised.

The first type of general assistance is development, which is generally humanitarian in nature to improve the situation of the general population affected by violence by providing them their basic needs. In Uganda development and demobilisation packages have been the principle measures for support to victims. The Northern Uganda conflict created a large grey zone, where tens of thousands of individuals were abducted by the LRA or organised in to local self-defence units by the government. The Amnesty Act 2000 enabled individuals who were members of the LRA (including those abducted) to return without fear of prosecution and to avail of a demobilisation package. However this caused resentment amongst other victims and communities, as one Northern Ugandan said, ‘I am a victim, but

112 See Root n.87.
113 See de Greiff, p470.
I do not have the benefits of a perpetrator who is also a victim. Reparations to other victims have been limited to sporadic payments by the government to specific victims during elections. Instead of a general reparations programme for victims of the Northern Ugandan conflict, the government has declared that developmental programmes are reparations, such as Northern Ugandan Social Action Fund (NUSF), and the Peace Recovery and Development Plan (PRDP). However, these programmes involve reconstruction of infrastructure and development of social services to the general population, but they do not specifically remedy or acknowledge the harm suffered by victims and seek to remedy their harm. In addition, the Trust Fund for Victims in conjunction with the International Criminal Court also provides assistance to some victims, including sensitisation programmes, reconstructive surgery, and counselling. Yet this assistance does not specifically remedy the harm caused to victims. Moreover, such development avoids the responsibility of the state in atrocities its forces committed.

The second type of general assistance are services. In Northern Ireland, a service based approach has dominated provision to victims and survivors’ needs. As a result of the Good Friday Agreement and subsequent reports in to provisions for victims, funds where established to support victims through numerous victim groups, representing different areas, constituents and political opinion. Beneficiaries of such schemes are based on a broad definition of victim as ‘someone who is or has been physically or psychologically injured, [provides substantial amount of care for such a person, or bereaved] as a result of or in consequence of a conflict-related incident’. The inclusive nature of the definition was intentional to avoid contention over service provision, reflecting more humanitarian concerns than accountability. Services provided to victims are funded now through the Victims and Survivors Service (VSS), and reviewed through the Commission for Victims and Survivors. Services included counselling, befriending, respite breaks, chronic pain management and retraining schemes. However, the service basis of support to victims is based on budgetary allocations by the local Northern Ireland government, making such provision discretionary without any long term commitment. In terms of accountability such measures do not publicly acknowledge individuals as

---

115 Interview, Gulu, 5 July 2011.
116 For instance, in the Mukura massacre on the 11th July 1989, the UPDF rounded up 300 male civilians suspected of being LRA collaborators and put them in a train wagon. When they were released four hours later, 69 of them had suffocated to death. See the Mukura Massacre of 1989, Justice and Reconciliation Project, Field Note XII, March 2011. Only in June 2010 did the government apologise, complete the memorial site for the mass grave with a public library, and pay Shs 200 million (£50,000) of compensation.
117 President asks Acholi to let go of past, Daily Monitor, 29 November 2011.
118 See Moffett n.40, p212-214.
120 S.3, Victims and Survivors (Northern Ireland) Order 2006’.
121 Services for Victims and Survivors, Northern Ireland Office (2005), p6.
122 Previous schemes were funded through the Community Relations Council, the Community Foundation for Northern Ireland, and the Northern Ireland Memorial Fund.
123 Recent reviews initiated by the Commission has found more systemic problems with the funding and assessments carried out by the VSS. See The Victims and Survivors Service: An Independent Assessment, WKM, 2014; and Independent assessment of the Victims and Survivors Service, The Chartered Institute of Public Finance and Accountancy, (2014).
victims, as service provision loses the recognition, entitlement and responsibility aspects, associated with reparations, through their delivery by groups. In terms of remedy, services provided have been criticised for their access issues, location, standard of provision, and ability to respond to victims’ needs.124

The third type of general assistance is collective reparations, which are measures awarded to groups or communities identified as having suffered and can include symbolic measures, such as memorials. Collective reparations can be more cost effective in offering acknowledgement to large groups of victims, rather than individual monetary awards. These awards can avoid victim competition by applying equally to all those victimised, thereby avoiding a hierarchy of suffering sometimes associated with compensation.125 They can also potentially benefit other victims who are able, such as the construction of a health centre in an area. But this is a double-edged sword, as collective reparations risk compromising individual victims’ right to a remedy and benefiting those who were not victimised.

In Peru, while members of the Shining Path are excluded from individual reparations, they are able to benefit from collective reparations awarded to communities.126 In the Lubanga case before the International Criminal Court, the support of the Court of collective reparations was criticised by some of the victims who argued that community reparations were inappropriate given that the community ‘accepted this behaviour [the recruitment and use of child soldiers in the Ituri conflict] for the most part and supported the leaders who engaged in it. Many even collaborated.’127 This decision has impacted other victims’ perceptions of the Court in meaningfully addressing their needs. By way of example in the Kenyan case of Ruto and Sang, at least 47 victims have pulled out of participating at the Court on the basis that reparations would be ordered collectively, such as the construction of a hospital, meaning that perpetrators who continue to live near victims would be able to benefit from the harm they caused.128

Development, services and collective reparations offer alternative ways to approach assisting and remedying the harm suffered by all individuals without making distinctions in terms of

126 Collective reparations to communities has meant that members of Sendero have benefitted. See Root n.87, p134.
127 Procureur v Thomas Lubanga Dyilo, Observations du groupe de victimes VO2 concernant la fixation de la peine et les réparations, ICC-01/04-01/06-2869, 18 April 2012, and “Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/0004/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10”, ICC-01/04-01/06-2864, 18 April 2012, para.16.
128 Procureur v Ruto and Sang, Common Legal Representative for Victims’ Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, ICC-01/09-01/11-896-Corr-Red, 5 September 2013, para.12. The letter was based on the wishes of 93 victims – 47 who had their participation status confirmed in the case, with 13 whose status is unclear, and 33 outside the scope of the case. There were some 628 victims participating as of August 2014. See also Amnesty International, Crying For Justice: Victims’ perspectives on justice for the post-election violence in Kenya, AFR 32/001/2014 (July 2014).
responsibility. This in itself may promote reconciliation and peace, rather than accountability. However, such ambiguity of victimhood and responsibility undermines the meaningfulness of reparations as an effective remedy and a means of accountability. The distinction of victims from other individuals and groups is important in acknowledging serious suffering and providing measures that try to as far as possible remedy the harmful consequences. In the same vein, by also seeking to include complex victims we are potentially weakening reparations and the identity of victim as a means of accountability and remedy.

The human rights and development approaches, represent two different ways to address reparations for complex victims. Human rights predominately now follows non-discrimination for complex victims of gross violations, avoiding issues of responsibility of individuals, and concerned with remedying the harm caused for gross violations. In contrast development, services and collective reparations are widely defined, but risk losing their remedial effect for victims. Common to both is to ignore individual responsibility; yet by neglecting this important aspect it could cause secondary victimisation to those complex victims harmed. Added to this, such universal acceptance of victimisation without any official distinction of responsibility could enable victimisers to legitimise the wrongs of the past and deny the experience of those who suffered. Thus while remedying the past can attach goals of reconciliation and peace, accountability remains a cornerstone of reparations, which gives value to victims who seek it to have their own harm acknowledged and to hold those responsible to redress the harm they have caused.

Conceivably, there is another way, between recognising victimisation and responsibility. Such an approach would require an inclusive approach to acknowledge victimisation caused by gross violations of human rights, allowing states the flexibility to prioritise those which cause the most acute and continuing suffering, i.e. disappearances, torture, extrajudicial killings, and sexual violence. Responsibility of complex victims would not exclude them from reparations, given the serious nature of the violence committed against them. They would however be limited to certain types of reparations, such as rehabilitation and pecuniary damages, or alternatively compensation awards could have a symbolic amount deducted, i.e. 10%, to reflect their responsibility in victimising others. Illegal armed groups and the state would also be responsible actors, which can contribute to reparations. Such a complex approach better captures the lived experience of individuals and groups in collective violence, which not only involves victims, perpetrators and complex victims, but also non-state and state actors.

E. Conclusion

As transitional justice has been traditionally rooted in accountability we hold onto simplistic definitions of identity and responsibility to help make sense of senseless violence. In life, violence and human behaviour do not lend themselves to such superficial distinctions of innocent victims and bad perpetrators. This contention of identity is accentuated with reparations, which attempt to remedy harm caused and acknowledge suffering by those responsible. A complex picture of victimisation and
responsibility recognises that victims are not always innocent, but can be or become victimisers. This is not to deny their suffering or to say that some or all victims will be perpetrators. Rather the intention here is to acknowledge that victims are human beings who have suffered, and that some of them through their conduct or association are responsible for victimising others. As noted at the start of this paper, failing to include complex victims within reparations mechanisms has the potential to reinforce innocent victim stereotypes, deny redress to those complex victims who have suffered from gross violations of human rights, and could undermine long term prospects of peace by inhibiting the remedial and accountability prospects. For reparations to reconcile the acknowledgement and responsibility of complex victims it requires a more composite approach to accountability.

Reparations in transitional justice, although a more political project, than a juridical one, depend on whether complex victims are deemed to ‘fit’ within the dominant political narrative that emerges from the transition. As such the application and adherence of legal principles and rules is more flexible than that of a court. Just as identity in transitional societies can be used to construct legitimacy, so can reparations. As a political project, given the asymmetry between suffering and the law’s ability to hold those responsible to account, reparations in transitional justice processes often involve the prioritisation of suffering of certain individuals and groups over others. Human rights law perhaps can provide guidance here in trying to remedy the harm suffered by gross violations of human rights, without distinction, but gives little guidance on the responsibility of complex victims. Instead a more composite approach would entail recognising individuals who suffer from gross violations of human rights and allowing them to claim reparations, including complex victims, but such victims would have limited reparations or reduced compensation to reflect their responsibility in victimising others. By affirming accountability as part of reparations we can hopefully depoliticise contentions around reparations for complex victims, by neither excluding them nor equating them with innocent victims.

129 For instance see the tiered system in the Kenyan Truth, Justice and Reconciliation Commission Final Report, Vol. IV.