

## SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW

# Collective reparation for victims of armed conflict

**Friedrich Rosenfeld\***

Dr. Friedrich Rosenfeld studied at Bucerius Law School in Hamburg and Columbia Law School in New York.

### **Abstract**

*Reparations are essential to establishing justice after armed conflicts. The question whether international law endorses an individual right to reparation has been a focal point of recent discussion in that regard. The victims of armed conflicts are, however, not only individuals but also collectives. The present article therefore examines the issue of collective reparation. While it is submitted that the question whether there is a right to such a remedy is not yet settled, it is argued that responsible parties should develop robust programmes of collective reparation.*



Armed conflicts rage in many parts of the world, claiming high numbers of victims.<sup>1</sup> These victims are not without protection: it is well established that violations of international law must be remedied by reparation. Thus the Permanent Court of International Justice held in the *Chorzow Factory* case that ‘reparation must, 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’.<sup>2</sup>

The recent discussion on this subject has largely centred on the question of whether an individual right to reparation exists. Although scholars have not yet reached consensus on this point, there is at least a strong tendency to acknowledge the entitlement of the individual to reparation under modern international law.<sup>3</sup>

\* Dr. Rosenfeld wishes to thank Prof. Dr. Rainer Hofmann for his valuable comments on an earlier draft of this article.

Among the different forms of individual reparation, restitution and compensation are those most commonly awarded.<sup>4</sup>

In contrast to individual reparation, collective reparation has received little scholarly attention. It is unclear to date whether collectives have a right to reparation, so this question is examined in the present article. In the first part, the concept of collective reparation is defined. It is followed by an analysis of the normative framework for collective reparation, which shows that international law supports the idea of collective reparation but leaves unclear whether such a remedy must be conceived of as a right. The final part stresses that the uncertainties as to the legal status of collective reparation should not divert attention from the need to develop robust programmes of collective reparation.

## Definition of collective reparation

For the purposes of the present article, collective reparation will be defined as the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law.<sup>5</sup> Collective reparation

- 1 Lotta Harbom, Erik Melander, and Peter Wallensteen, 'Dyadic dimensions of armed conflict, 1946–2007', in *Journal of Peace Research*, Vol. 45, 2008, pp. 697ff.
- 2 Permanent Court of International Justice, *Case Concerning Factory at Chorzów*, Merits, Series A, No. 17, (1928), p. 47. Deviations from the standard of full reparation are discussed for situations of mass atrocities. See e.g. Ethiopia–Eritrea Claims Commission, Final Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, *Eritrea's Damages Claims*, 17 August 2009, para. 22.
- 3 Emanuela-Chiara Gillard, 'Reparation for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 85, No. 851, 2003, p. 536; Riccardo Pisillo Mazzeschi, 'Reparation claims by individuals for state breaches of humanitarian law and human rights: an overview', in *Journal of International Criminal Justice*, Vol. 1, 2003, p. 343; Albrecht Randelzhofer, 'The legal position of the individual under present international law', in Albrecht Randelzhofer and Christian Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, Martinus Nijhoff, The Hague, 1999, p. 231; Andreas Fischer-Lescano, 'Subjektivierung völkerrechtlicher Sekundärregeln: die Individualrechte auf Entschädigung und effektiven Rechtsschutz bei Verletzungen des Völkerrechts', in *Archiv des Völkerrechts*, Vol. 45, 2007, p. 331; Robert Bank and Elke Schwager, 'Is there a substantive right to compensation for individual victims of armed conflict against a state under international law?', in *German Yearbook of International Law*, Vol. 49, 2006, pp. 398ff.; Elke Schwager, *Ius bello durante et bello confecto*, Duncker & Humblot, Berlin, 2008; Rainer Hofmann, 'Victims of violations of international humanitarian law: do they have an individual right to reparation against states under international law?', in Pierre-Marie Dupuy et al. (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat*, N.P. Engel Verlag, Kehl, 2006, p. 357; Micaela Frulli, 'When are states liable towards individuals for serious violations of humanitarian law? The *Markovich* case', in *Journal of International Criminal Justice*, Vol. 1, 2003, pp. 417f.; Marco Sassòli, 'State responsibility for violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 419; Liesbeth Zegveld, 'Remedies for victims of violations of international humanitarian law', in *International Review of the Red Cross*, Vol. 85, No. 851, 2003, pp. 497f.
- 4 For an overview of the remedies awarded under claims programmes, see Howard M. Holtzmann and Edda Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, Oxford, 2007; Hans van Houtte, Bart Delmartino, and Iasson Yi, *Post-war Restoration of Property Rights under International Law*, Cambridge University Press, Cambridge, 2008; Norbert Wühler and Heike Niebergall, *Property Restitution and Compensation*, International Organization for Migration (IOM), Geneva, 2008.
- 5 On the definition of collective reparation, see also Heidi Rombouts, *Victim Organisations and the Politics of Reparation*, Intersentia, Antwerp, 2004, pp. 34f.

thus consists of four elements: benefits, a collective as beneficiary, collective harm, and a violation of international law. These elements will now be considered in greater detail.

## Benefits

Collective reparation encompasses a wide range of different benefits. Representative examples can be found in the reports of truth commissions, which have repeatedly underlined the importance of collective reparation. Among the measures that have been recommended are the construction of schools or hospitals,<sup>6</sup> the establishment of memorials,<sup>7</sup> or the renaming of streets.<sup>8</sup>

Two aspects of these benefits merit special attention. First, they are indivisible: victims who receive collective reparation are not able to enjoy the benefit on their own, but have to share it with other victims. Second, the benefits are diverse: while the most commonly awarded forms of individual reparation – that is, compensation and restitution – have a clearly defined content, collective reparation can take very different forms. As will be shown below, this has consequences for the question of whether collective reparation can be conceived of as a right.

## Collective

Various collectives might be the beneficiaries of reparation.<sup>9</sup> The collectives that truth commissions have dealt with have included women and children,<sup>10</sup> village communities,<sup>11</sup> rural communities,<sup>12</sup> native communities,<sup>13</sup> and groups of displaced persons.<sup>14</sup> Examples of groups enjoying collective rights are found in the jurisprudence of the Inter-American Court of Human Rights (IACtHR).<sup>15</sup> For purposes of legal categorization, the beneficiaries of collective reparation might be divided into

6 Peruvian Truth and Reconciliation Commission, *Programa Integral de Reparaciones*, paras. 2.2.3.2 and 2.2.4.3.3, available at: <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2%20PIR.pdf> (last visited 12 August 2010).

7 Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), *Chega!*, Final Report of the CAVR, para. 10.3.4, available at: <http://www.cavr-timorleste.org/en/cheгаReport.htm> (last visited 10 August 2010).

8 South African Truth and Reconciliation Commission (TRC), *Truth and Reconciliation Commission of South Africa Report*, March 2003, Vol. 6, Section 2, ch. 1, para. 14, available at: <http://www.justice.gov.za/trc/report/index.htm> (last visited 12 August 2010).

9 The adjective 'collective' specifies the subject that receives reparation, not the process of awarding reparation. Situations where individual claims are settled in a mass claims procedure are therefore not considered as collective reparation.

10 CAVR, above note 7, para. 11.4.

11 *Ibid.*, para. 10.2.

12 Peruvian Truth and Reconciliation Commission, above note 6, para. 2.2.2.2.2.

13 *Ibid.*

14 *Ibid.*

15 See IACtHR, *Mayagna (Sumo) Awas Tingi Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs).

groups with legal personality on the one hand and aggregates of individuals on the other.

## Collective harm

One of the most fundamental concepts of collective reparation is that it helps to undo what has been called ‘collective harm’.<sup>16</sup> This term is intended to express the idea that the targeting of a collective can cause harm that differs from the harm caused by targeting the same number of individuals who are not part of a collective. The existence of collective harm is evident in cases such as the Holocaust or the genocide of the Tutsi in Rwanda. The systematic extermination of the Jews in Europe caused harm that transcended the harm that would have resulted from the killing of an equivalent number of people not belonging to that group. It would likewise have made a difference for a Tutsi whether he or she was attacked as a Tutsi or as a person. Thus the group of Tutsi or Jews might constitute a source of identity and a socialization mechanism whose disruption constitutes collective harm.<sup>17</sup>

The fact that international criminal law penalizes the destruction of groups as genocide confirms that the harm resulting from such a crime is greater than the harm resulting from the killing of an equivalent number of people not belonging to a group. Collective harm is not, however, restricted to cases of genocide. A widespread killing of members of a certain tribe who do not constitute a group in the sense of Article 6 of the Rome Statute of the International Criminal Court (ICC)<sup>18</sup> might still cause collective harm. Nor does collective harm presuppose a violation of collective rights, as the example of the European Jews or the Tutsi in Rwanda shows. For collective harm to occur it is therefore sufficient that victims share certain bonds, such as common cultural, religious, tribal, or ethnic roots.<sup>19</sup>

## Violation of international law

The collective harm must have been caused by a violation of international law. A regime of liability for lawful conduct has not yet developed in international law.<sup>20</sup>

16 See the comprehensive analysis by Paul Dubinsky, ‘Justice for the collective: the limits of the human rights class action’, in *Michigan Law Review*, Vol. 104, 2004, p. 1182. See also Naomi Roth-Arriaza, ‘Reparations, decisions and dilemmas’, in *Hastings International and Comparative Law Review*, Vol. 27, 2004, p. 181.

17 On the effects that violations of international law can have on collectives, see Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986–2006*, Berghahn, Oxford, 2009, p. 236.

18 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 of 17 July 1998.

19 For an example of the jurisprudence of the Inter-American Court of Human Rights, see IACtHR, *Moiwana Community v. Suriname*, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs).

20 This is problematic given the large number of incidental losses resulting from lawful conduct. For a discussion of a right to reparation in these situations, see Yaël Ronen, ‘Avoid or compensate? Liability for incidental injury to civilians inflicted during armed conflict’, in *Vanderbilt Journal of Transnational Law*, Vol. 42, 2009, p. 181, pp. 195ff.

The rules on collective reparation are thus secondary rules that govern the relationship resulting from the breach of primary rules.<sup>21</sup> In this regard it should be noted that there are several primary norms that require states to act. In particular, there are an increasing number of positive human rights obligations.<sup>22</sup> Conceptually, collective reparation has to be distinguished from these primary obligations. While positive obligations require states to act irrespective of a prior violation of international law, the obligation to make reparation presupposes such a violation.

## Normative framework

The four characteristics of collective reparation as described above are fundamental to understanding the problems inherent in conceiving collective reparation as a right. These will be dealt with in the following part. It will first be explained that there are two ways of conceptualizing a right to collective reparation. It will then be shown that international law *de lege lata* leaves unclear whether groups have a right to collective reparation. Finally, some considerations *de lege ferenda* will be set forth.

## Conceptualizing a right to collective reparation

There is heated discussion among scholars as to whether and, if so, to what extent public international law endorses the idea of group rights.<sup>23</sup> Some authors argue that international law already comprises certain group rights, which should therefore be accepted as a distinct category of rights.<sup>24</sup> Others take a rather critical stance towards group rights.<sup>25</sup> It would be beyond the scope of the present article to

21 For further reference, see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, p. 14; Jean Combacau and Denis Alland, "Primary" and "secondary" rules in the law of state responsibility: categorizing international obligations', in René Provost (ed.), *State Responsibility in International Law*, Ashgate, Aldershot, 2002, pp. 67–95.

22 See Cordula Droege, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Springer, Berlin, 2003.

23 See e.g. Joseph Raz, *The Morality of Freedom*, Oxford University Press, Oxford, 1986, pp. 208f.; Luis Rodríguez-Abascal, 'On the admissibility of group rights', in *Annual Survey of International and Comparative Law*, Vol. 9, 2003, pp. 103ff.; J. Angelo Corlett, 'The problem of collective moral rights', in *Canadian Journal of Law and Jurisprudence*, Vol. 7, 1994, pp. 252ff.; Nathan Brett, 'Language laws and collective rights', in *Canadian Journal of Law and Jurisprudence*, Vol. 4, 1991, pp. 353ff.; Leslie Green, 'Two views of collective rights', in *Canadian Journal of Law and Jurisprudence*, Vol. 4, 1991, p. 323.

24 Jeremy Waldron, *Liberal Rights*, Cambridge University Press, Cambridge, 1993, p. 361. Examples of group rights are Article 1 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; Articles 3ff. of the International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries; Articles 23ff. of the African Charter on Human and Peoples' Rights.

25 Michael Hartney, 'Some confusions concerning collective rights', in Will Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford University Press, Oxford, 1995, p. 203. For further references, see Peter Jones,

engage in an in-depth analysis of this problem. It does, however, need to be highlighted that there are two ways of conceptualizing a right to collective reparation. On the one hand, one might conceive of a right that pertains to a group with legal personality. For the purposes of the present article, such rights will be designated as ‘group rights *strictu sensu*’. On the other hand, one might conceive of a right that pertains to an aggregate of individuals. Thus, the right at issue in such a situation is not a group right *strictu sensu* but a right that pertains to a multiplicity of obligees. Rights of a multiplicity of obligees are known from national legal systems. As an example, one might adduce Section 432 of the German Civil Code, which stipulates:

If more than one person is to demand indivisible performance, then to the extent that they are not joint and several creditors, the obligor may only effect performance to all of them jointly and each obligee may only demand performance for all of them.<sup>26</sup>

In a similar vein, Article 10.201 of the Principles of European Contract Law envisages ‘communal claims’ where the ‘debtor must perform to all the creditors and any creditor may require performance only for the benefit of all’.<sup>27</sup> Such communal claims can result from the nature of the obligation.

In the following analysis of the legal framework for collective reparation, this distinction between group rights *strictu sensu* and rights of a multiplicity of obligees will play an important role.

## Considerations *de lege lata*

### *Soft law*

The most recent effort to delineate victims’ rights to reparation was finalized with the adoption by the UN General Assembly on 16 December 2005 of Basic Principles on the Right to a Remedy and Reparation (henceforth ‘Basic Principles’).<sup>28</sup> Though not binding, these principles give important insights into the right to reparation. Under the Basic Principles, victims are defined 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

‘Group rights’, in *The Stanford Encyclopedia of Philosophy*, Winter 2008 edition, available at: <http://plato.stanford.edu/entries/rights-group/> (last visited 10 August 2010).

26 Section 432 of the German Civil Code, available in English at: [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html) (last visited 12 August 2010).

27 European Commission on Contract Law, *Principles of European Contract Law*, Part III, Art. 10.201, Kluwer Law, Dordrecht, 2002, pp. 77ff.

28 General Assembly Res. 60/147, 16 December 2005, 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 (henceforth ‘Basic Principles’).

violations of international human rights law, or serious violations of international humanitarian law.<sup>29</sup>

The remedies cited include adequate, effective, and prompt reparation.<sup>30</sup> Examples of reparation include measures such as commemorations and tributes to the victims.<sup>31</sup> These typically constitute collective reparation in the sense of the definition given above.<sup>32</sup>

In spite of this commitment to protect persons who are targeted collectively,<sup>33</sup> the Basic Principles leave unclear who is entitled to claim reparation. Some guidance can be found in the so-called 'Van Boven report'. This study, which preceded the adoption of the Basic Principles, explicitly demanded that groups of victims or victimized communities be entitled to present 'collective claims' for damages and to receive collective reparation accordingly.<sup>34</sup> This formulation is broad enough to cover group rights *strictu sensu* and rights of a multiplicity of obligees.

Collective reparation also plays a role in the Updated Set of Principles to Combat Impunity.<sup>35</sup> According to Principle 31, 'Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries'.<sup>36</sup> Principle 34 specifies that reparation shall include 'measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law'.<sup>37</sup> It is noteworthy that a previous draft of Principle 34 contained the word 'individual' before the phrase 'measures concerning the right to restitution, compensation ...'. This restriction was deleted in order to make clear that reparation does not pertain solely to individual measures but also includes collective measures.<sup>38</sup> As regards the procedure of providing reparation, Principle 32 now stipulates that reparations may be 'provided through programmes ... addressed to individuals and to communities'.<sup>39</sup> The legal position of these communities is not specified in more detail.

29 *Ibid.*, 'V. Victims of gross violations of international human rights law and serious violations of international humanitarian law', Principle 8 (emphasis added).

30 *Ibid.*, 'VII. Victims' right to remedies', Principle 11(b).

31 *Ibid.*, 'IX. Reparation for harm suffered', Principle 22(g).

32 See also Cherif Bassiouni, 'International recognition of victims' rights', in *Human Rights Law Review*, Vol. 6, 2006, p. 261.

33 A similar commitment can be found in the preamble to the Basic Principles, above note 28, where the General Assembly points out that 'contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively'.

34 UN Sub-Commission on the Promotion and Protection of Human Rights, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report*, submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para. 14.

35 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Addendum to the 'Report of the independent expert to update the Set of Principles to Combat Impunity', Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

36 *Ibid.*, Principle 31, 'Rights and duties arising out of the obligation to make reparation'.

37 *Ibid.*, Principle 34, 'Scope of the right to reparation'.

38 UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to Combat Impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102, 18 February 2005, p. 18, para. 61.

39 Updated Set of Principles, above note 35, Principle 32, 'Reparation procedures'.

## *Treaty law*

Compared to the soft law principles discussed above, treaty law is even more vague as regards the existence of a right to collective reparation. Provisions such as Article 3 of the 1907 Hague Convention (IV) or Article 91 of 1977 Additional Protocol I to the 1949 Geneva Conventions, which are often referred to as a basis for a right to reparation,<sup>40</sup> do not explicitly deal with collective reparation. Neither do human rights instruments.<sup>41</sup>

Some human rights conventions, however, implicitly recognize the existence of collective victims. Thus Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women provides a communications procedure, which allows either individuals or groups of individuals to submit individual complaints to the Committee established under Article 17 of the Convention. Communications may also be submitted on behalf of individuals or groups of individuals.<sup>42</sup> Likewise, the European Convention on Human Rights stipulates that the

Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.<sup>43</sup>

A similar provision can also be found in the American Convention on Human Rights. Its Article 44 stipulates that groups of persons or non-governmental entities ‘may lodge petitions with the Commission containing denunciations or complaints of violations of the Convention by a State Party’.<sup>44</sup> What is striking about these examples is that there is a procedural norm giving groups a possibility to present a claim before the respective judicial authority. It is left unclear, however, whether groups can only assert a violation of primary norms or whether they can also claim collective reparation.

Finally, mention must be made of Article 75 of the Rome Statute of the ICC, which states that ‘The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’.<sup>45</sup> The ICC’s Rules of Procedure and Evidence contain additional

40 See the comprehensive analysis by E. Schwager, above note 3.

41 See e.g. Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 and No. 14 (European Convention on Human Rights) of 4 November 1950; Article 63 of the American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969; Article 27 of the Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights.

42 Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, General Assembly Res. 54/4, 15 October 1999.

43 European Convention on Human Rights, above note 41, Art. 34.

44 American Convention on Human Rights, above note 41, Art. 44.

45 Rome Statute of the ICC, above note 18, Art. 75(1).

information on reparation.<sup>46</sup> Rule 97 stipulates that ‘the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both’.<sup>47</sup> The formulation ‘on a collective basis’ is ambiguous. On the one hand, it could signify that the Court makes multiple awards without taking into account the particular circumstances of every single claim. In this case, Rule 97 would be interpreted as a norm paving the way for a mass claims procedure. On the other hand, it could be interpreted as a norm envisaging the award of reparation to collectives.<sup>48</sup> In light of Rule 98, this seems more convincing. According to the latter rule, ‘The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of victims and the scope, forms and modalities of reparations makes a *collective award* more appropriate’.<sup>49</sup> Thus Rule 98 does not speak of several awards being made in a mass claims procedure, but of a single collective award. This might be interpreted as an implicit acknowledgement of a right to collective reparation – be it a group right *strictu sensu* or the right of a multiplicity of obligees. However, the wording of Rules 97 and 98 does not explicitly spell out such a right.

### *State practice*

In state practice, collective reparation has seldom played an important role. The most relevant examples of such remedies can be found in the jurisprudence of the Inter-American Court of Human Rights and in recommendations by truth commissions.

In the jurisprudence of the Inter-American Court of Human Rights there are a few decisions indicating that the Court embraces the concept of collective reparation. A prominent example is the decision rendered in the *Mayagna (Sumo) Awas Tingi Community v. Nicaragua* case, in which the Court found that Nicaragua had violated the right to property protected by Article 21 of the American Convention on Human Rights to the detriment of the members of the said indigenous community.<sup>50</sup> According to the Court, the violation of this primary right had to be remedied by a measure that benefited the group as such. It therefore decided that Nicaragua had to adopt in its domestic law, pursuant to Article 2 of the American Convention on Human Rights, ‘the legislative, administrative and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores’.<sup>51</sup> It must be emphasized that the Court considered the Mayagna (Sumo) Awas Tingi Community as holder of a

46 Rules of Procedure and Evidence of the ICC, Adopted by the Assembly of States Parties, New York, 3–10 September 2002, Official Records ICC-ASP/1/3.

47 *Ibid.*, Art. 97(1).

48 See e.g. Sarfaraz Ahmed Khan, *Rights of the Victims: Reparation by International Criminal Court*, APH Publishing, New Delhi, 2007, p. 25.

49 Rules of Procedure and Evidence of the ICC, above note 46, Rule 98(3), emphasis added.

50 IACtHR, above note 15.

51 *Ibid.*, para. 164.

collective right to property. Since this arguably presupposes – though only to a limited extent – legal personality, the reparative measure could be conceived of as a ‘group right’ *strictu sensu*. The Court did not, however, explicitly spell out such a right. Instead of using the language of rights, it used the language of obligations.

A further decision that addressed collective remedies was rendered in *Moiwana v. Suriname*. In this case, survivors of a massacre that took place in Moiwana village during the Surinamese civil war asserted a violation of their rights.<sup>52</sup> Since the massacre had occurred before Suriname became party to the American Convention on Human Rights, the Court could only rule upon those violations that had still continued after the Convention’s entry into force for Suriname.<sup>53</sup> Having found that Suriname had violated Articles 5, 8, 21, 22, and 25 of the American Convention on Human Rights,<sup>54</sup> the Court made the following remark on reparations:

Given that the victims of the present case are members of the N’djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole ....<sup>55</sup>

The collective reparation envisaged by the Court included measures such as an effective investigation,<sup>56</sup> the establishment of a development fund for health, housing, and educational programmes,<sup>57</sup> a public apology,<sup>58</sup> and the construction of a commemorative building.<sup>59</sup> This judgment is striking in that the decision to grant collective reparation was not based on the violation of any collective rights. Rather, it was the cultural bonds of the victims that, in the Court’s view, justified the award of collective reparation. Since the group concerned had no legal personality, a potential right to collective reparation was conceivable only as the right of a multiplicity of obligees. Again, the language used does not clearly support such an interpretation.

Yet another rationale for reparation with a collective dimension can be found in the decision rendered in ‘*Street Children*’ (*Villagrán-Morales et al.*) v. *Guatemala*.<sup>60</sup> In this case, the Court had to deal with crimes committed against street children by members of the security force, and the failure of state mechanisms to adequately respond to these violations. Ruling upon the question of reparation, the Court stressed the need to address not only the pecuniary damage

52 IACtHR, above note 19, para. 2.

53 *Ibid.*, para. 43.

54 *Ibid.*, para. 168.

55 *Ibid.*, para. 194.

56 *Ibid.*, para. 205.

57 *Ibid.*, para. 214.

58 *Ibid.*, paras. 216 f.

59 *Ibid.*, para. 218.

60 IACtHR, *The ‘Street-Children’ (Villagrán-Morales et al.) v. Guatemala*, Judgment of 26 May 2001 (Reparations and Costs).

but also those harmful effects that cannot be assessed in monetary terms.<sup>61</sup> As one remedy responding to this kind of harm, the Court ordered Guatemala to designate an educational centre with a name allusive to the victims. It further ordered Guatemala to place in that centre a plaque with the victims' names. As a justification for this measure, the Court adduced two reasons. On the one hand, it should raise awareness to avoid the repetition of similar harmful acts. On the other hand, it should keep the memory of the victims alive.<sup>62</sup>

There are good reasons for arguing that this judgment did not concern collective reparation in the sense of the definition given above. First, it is highly questionable whether the benefit at issue was intended to undo collective harm. Doubts arise because the Court ordered a very similar benefit in a case that concerned only one victim: in *Trujillo Oroza v. Bolivia*, the Court had to deal with the illegal detention, torture, forced disappearance, and death of a single person, José Carlos Trujillo Oroza.<sup>63</sup> It nevertheless ordered non-pecuniary reparation, including the assignment of the name of the victim to an educational establishment in Santa Cruz. As a justification, the Court argued that this measure would contribute to raising public awareness about the need to avoid the repetition of similar harmful acts and to keeping the victim's memory alive.<sup>64</sup> The fact that there was only one direct victim did not bar the Court from awarding almost the same kind of reparation as in the *Street Children* case mentioned above.<sup>65</sup>

Second, it must be noted that, insofar as the reparative measures were designed to prevent the recurrence of similar violations in the future, the Court ordered measures that were typically owed under primary obligations. This blurring of primary and secondary obligations becomes even more evident in *Caracazo v. Venezuela*.<sup>66</sup> In this case, the Court had to deal with violations of human rights committed by Venezuelan armed forces and security agencies during public order disturbances.<sup>67</sup> Ruling upon the question of reparation, the Court ordered Venezuela to provide for training of all members of its armed forces and security agencies on the principles and provisions of human rights protection and regarding the limits to which the use of weapons by law enforcement officials is subject.<sup>68</sup> These measures are not typical reparative measures, since they are owed irrespective of a prior violation of rights.

The foregoing analysis shows that collective reparation plays a role in the jurisprudence of the Inter-American Court of Human Rights. In all the decisions examined, the Court awarded remedies that benefited not only a single person but also collectives. These collectives included a group enjoying primary rights, as well as aggregates of individuals without legal personality. It remains unclear whether

61 *Ibid.*, para. 84.

62 *Ibid.*, para. 103.

63 IACtHR, *Trujillo-Oroza v. Bolivia*, Judgment of 27 February 2002 (Reparations and Costs), para. 53.

64 *Ibid.*, para. 122.

65 Additional indirect victims were the next of kin of José Carlos Trujillo Oroza.

66 IACtHR, *El Caracazo v. Venezuela*, Judgment of 29 August 2002 (Reparations and Costs).

67 *Ibid.*, para. 66.

68 *Ibid.*, para. 127.

the Court considered these collectives as a holder of a right to reparation. The language used by the Court is not supportive of a group right. Thus the Court did not speak of a ‘right of the respective communities’ but of an obligation of the responsible state to take reparative measures.

Truth commissions have likewise dealt with collective reparation and, as mentioned above, have repeatedly recommended it.<sup>69</sup> Despite the various commitments to protect communities, truth commissions did not specifically address their legal status either. In that regard, all that can be found in their recommendations are definitions of the term ‘victim’. Truth commissions have pointed out that victims include persons who are harmed ‘collectively’,<sup>70</sup> ‘together with one or more persons’<sup>71</sup> or ‘as part of a collective’.<sup>72</sup> These formulations closely resemble the definition used in the Basic Principles. They do little to elucidate whether and, if so, to what extent there is a right to collective reparation.

### Considerations *de lege ferenda*

This rather opaque picture of the normative framework *de lege lata* leads to the question of whether collective reparation is conceivable as a right *de lege ferenda*. I shall not provide a definite answer to this question but confine my analysis to setting out four dilemmas that the acknowledgement of a right to collective reparation might entail.

#### *Determining the holder of the right*

The first dilemma concerns the difficulty of determining the holder of a right to collective reparation. Our society consists of a huge variety of sub-groups. In many cases these groups lack clear delimitations, so that it is difficult – if not impossible – to ascertain who is a member of the group and who is not. It would not make sense for a legal order to grant all these groups collective rights. This is so because, for a norm to be effective, there must be clarity as to who can claim a right. Conversely, it must be clear to whom a duty is owed.

This objection might be countered by arguing that the group of victims who may claim collective reparation consists of those persons who have suffered collective harm. But this does not solve the problem, because it is difficult to determine who has suffered collective harm. In the wake of armed conflicts, different groups might claim to have done so. At one end of the spectrum, there could conceivably be a situation where an armed attack is directed against an already

69 See the section ‘Benefits’ above.

70 *Final Report of the Truth and Reconciliation Commission of Sierra Leone*, Vol. 2, ch. 4, ‘Reparations’, para. 27, referring to the Basic Principles, above note 28.

71 See South Africa, Promotion of National Unity and Reconciliation Act, Act 34 of 26 July 1995, Art. 1(xix), available at: [http://www.info.gov.za/view/DynamicAction?pageid=545&sdate=%201995&orderby=act\\_no%20desc](http://www.info.gov.za/view/DynamicAction?pageid=545&sdate=%201995&orderby=act_no%20desc) (last visited 10 August 2010). This Act is referred to by the TRC, above note 8, Vol. 6, Section 2, ch. 2, para. 5.

72 CAVR, above note 7, para. 10.1.2.

existing group of people with legal personality, which enjoys protection under a primary collective right. In this case it might be quite easy to determine the group of victims who have suffered collective harm. At the other end of the spectrum, there is the situation where no group existed at the time the armed conflict took place. In that case it is only the jointly suffered harm that unites the 'group' of victims. It is questionable whether this is sufficient to constitute collective harm.<sup>73</sup>

### *Determining the benefit*

The second dilemma arises from the fact that there are a wide variety of benefits that might be awarded as a form of collective reparation; as stated above, the benefits that have been recommended as collective reparation range from the construction of a memorial through the renaming of streets to the construction of hospitals. There are two ways to deal with this problem. On the one hand, the benefit could be determined in consultation with the victims, as has been recommended by several truth commissions.<sup>74</sup> This procedure might be a very useful policy option. From a legal perspective, however, it seems rather problematic to let the beneficiaries determine their own benefits. On the other hand, one might conceive of an abstract right that obligates the responsible party to confer upon victims a benefit that is not defined in more detail. This solution, too, seems problematic because the benefit would be highly unspecific. The creation of an ineffective right might weaken the concept of rights as such.<sup>75</sup>

### *Enforceability*

The third dilemma concerns the implementation of a right to collective reparation. The large majority of collectives that have been affected by armed conflicts have no legal personality. They tend to consist of groups that share certain bonds such as common cultural or tribal roots. Even if it is possible to conceive of a right of a multiplicity of obligees who do not enjoy legal personality, the problem of how to enforce such a right would still remain. Groups that want to exercise their rights need to be internally organized.<sup>76</sup> There must, for example, be an agent who is entitled to represent their interests. Typically, the groups that suffer collective harm do not meet these requirements.

73 In particular, there are no further common bonds between the victims; no source of identity is destroyed.

74 CAVR, above note 7, para. 12.7; see also Report of the Commission for Historical Clarification, *Guatemala: Memory of Silence*, Conclusions and Recommendations, Recommendations III, para. 11, available at: <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> (last visited 10 August 2010).

75 See also Philip Alston, 'Conjuring up new human rights: a proposal for quality control', in *American Journal of International Law*, Vol. 78, 1984, pp. 607ff.

76 Viola Wenzel, *Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht*, Springer, Berlin, 2008, pp. 27f.

### *Interplay with individual reparation*

Finally, there is a general problem about granting rights to groups, namely the risk of thereby undermining individual rights. Group rights and individual rights may in fact conflict in various ways.<sup>77</sup> Moreover, the rights of the group may not only encroach upon rights of its members but may also come into conflict with rights of outsiders.

Nonetheless, in the context of collective reparation, the significance of this problem seems rather limited. Above all, it must be borne in mind that collective reparation addresses collective harm alone, and not individual harm. In most cases it will therefore only have a supplementary function. Individual harm will still have to be remedied by individual reparation. An exception might only occur if there is exclusive violation of a group right *strictu sensu*. In such a situation there would probably be no need for individual reparation, because of the absence of individual harm. This would hardly pose any problems, as the secondary right to reparation would only ‘follow’ the primary group right. In other words, in order to challenge collective reparation in this case, the primary group right would need to be challenged as well. Apart from this, it is highly questionable whether the possibility of conflicts between group rights and individual rights is a valid objection to group rights. Conflicting claims to autonomy can be found in every legal system.<sup>78</sup> From a legal perspective, it makes hardly any difference whether a collective or an individual entity voices such a claim to autonomy: in both cases the conflict between the two claims has to be resolved.<sup>79</sup> Striking a balance between them seems the most suitable means of meeting this challenge.<sup>80</sup>

### *Conclusion*

The acknowledgement of a right to collective reparation poses several problems. The present article has no intention of suggesting that these problems warrant the rejection of a right to collective reparation. As shown above, there are situations in which one can conceive of such a right. In others, however, this seems hardly possible. Future discussion on a right to collective reparation should therefore be kept under particularly careful observation.

77 *Ibid.*, pp. 185ff.; see also Allen Buchanan, ‘The role of collective rights in the theory of indigenous peoples’ rights’, in *Transnational Law and Contemporary Problems*, Vol. 3, 1993, pp. 107f.

78 Immanuel Kant, *Die Metaphysik der Sitten*, Suhrkamp Verlag, Frankfurt-am-Main, 2005, p. 337.

79 An-Naim Abdullahi, ‘Human rights and the challenge of relevance: the case of collective rights’, in Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (eds), *The Role of the Nation State in the 21st Century: Human Rights, International Organizations and Foreign Policy: Essays in Honour of Peter Baehr*, Kluwer Law International, The Hague, 1998, pp. 3 f.; J. A. Corlett, above note 23, p. 256; Lesley A. Jacobs, ‘Bridging the gap between individual and collective rights with the idea of integrity’, in *Canadian Journal of Law and Jurisprudence*, Vol. 4, 1991, pp. 385f.

80 V. Wenzel, above note 76, pp. 236ff.

## The need for collective reparation

The existing uncertainties as to the legal status of collective remedies should not detract from their high reparative capacity. Above all, collective reparation has a remedial function.<sup>81</sup> By awarding a benefit to the collective that has suffered harm, collective reparation constitutes a form of acknowledgement of that collective. This helps to undo the harm that has been caused. Unsurprisingly, there is empirical data indicating that victims of armed conflict sometimes demand collective remedies.<sup>82</sup>

Collective reparation is not limited to undoing the immediate effects of the harm suffered. Rather, it also contributes to the long-term goal of building up peaceful post-conflict societies.<sup>83</sup> Efforts to promote reconciliation in war-torn societies ultimately aim to create conditions for the coexistence of victims and perpetrators. Collective reparation can play an important role in this process, as has repeatedly been emphasized by truth commissions. Thus the Truth Commission for Timor Leste stated: ‘Helping individuals and communities who had suffered to recover, and restoring their sense of dignity, was inseparable from the task of repairing relationships damaged by conflict and of building lasting reconciliation’.<sup>84</sup>

Progress towards the objective of forging a new society might be hampered by an entirely individualized claims process.<sup>85</sup> This is not meant to suggest that collective reparation should replace individual reparation. However, certain disruptive effects that may go along with individual reparation can be avoided by having recourse to collective reparation. A distinguishing characteristic of collective remedies is notably that they reach every victim who has suffered harm during an armed conflict.<sup>86</sup> This avoids the negative side-effect of individual reparation that single victims might not receive any reparation at all.<sup>87</sup> Such an exclusion of individual victims from an individualized claims process can have several

81 On the remedial function of reparation, see e.g. Ethiopia–Eritrea Claims Commission, above note 2, para. 26; the passage cited refers to individual reparation.

82 Victor Espinoza Cuevas, María Luisa Ortiz Rojas, and Paz Rojas Baeza, *Truth Commissions: An Uncertain Path?, Comparative study of truth commissions in Argentina, Chile, El Salvador, Guatemala and South Africa from the Perspective of Victims, Their Relatives, Human Rights Organisations and Experts*, Corporación de Promoción y Defensa de los Derechos del Pueblo (CODEPU-Chile)/Association for the Prevention of Torture (APT-Switzerland), pp. 31ff., available at: <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=CAB359A3-9328-19CC-A1D2-8023E646B22C&lng=en&id=103018> (last visited 12 August 2010).

83 Linda M. Keller, ‘Seeking justice at the International Criminal Court: victims’ reparations’, in *Thomas Jefferson Law Review*, Vol. 29, 2007, p. 212.

84 CAVR, above note 7, para. 10.1.4; see also Report of the Commission for Historical Clarification, above note 74, para. 10.

85 Lisa Magarell, *Reparations in Theory and in Practice*, International Center for Transnational Justice, October 2007, pp. 5f., available at: <http://www.ictj.org/static/Reparations/0710.Reparations.pdf> (last visited 10 August 2010).

86 Stef Vandeginste, ‘Reparation’, in David Bloomfield *et al.*, *Reconciliation after Violent Conflict: A Handbook*, IDEA Handbook Series, Stockholm, 2003, pp. 145ff.

87 *Ibid.*; see also L. M. Keller, above note 83, p. 213.

reasons: they may not have the necessary funds or information to lodge a claim;<sup>88</sup> they may be unable to invoke the jurisdiction of a certain court;<sup>89</sup> and the number of compensatory awards may be restricted due to limited resources.<sup>90</sup>

Collective reparations are thus a necessary response to collective harm. Irrespective of whether one can conceive of a right to these remedies, responsible parties should make every effort to develop robust programmes of collective reparation. The choice of the appropriate remedy should be made in consultation with the victims.

88 Peruvian Truth and Reconciliation Commission, above note 6, para. 2.2.1.3.

89 *Ibid.*

90 On the limitations of individual reparations schemes see N. Roth-Arriaza, above note 16, p. 181.