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Reparations for 'guilty victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms

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Abstract: Reparations are often declared victim-centred, but in transitional societies defining who is a victim and eligible for reparations can be a politically charged and controversial process. Added to this, the messy reality of conflict means that perpetrators and victims do not always fall in two separate categories. Instead in certain circumstances perpetrators can be victimised and victims can be responsible for victimising others. This article explores complex victims, who are responsible for victimising others, but have themselves been unlawfully victimised. Looking in particular at the 1993 Shankill bombing in Northern Ireland, as well as Colombia and Peru, such complex victims are often seen as 'guilty' or 'bad' victims undeserving of reparations. This article argues that complex victims need to be included in reparation mechanisms to ensure accountability and to prevent their exclusion becoming a source of victimisation and future violence. It considers alternative avenues of human rights courts, development aid, services and community reparations to navigate complex identities of victim-perpetrators. In concluding the author finds that complex identities can be accommodated in transitional societies reparation programmes through nuanced rules of eligibility and forms of reparations.

Keywords: Reparations; victimhood; complex victims; victim-perpetrators; responsibility; acknowledgement; Northern Ireland; Peru; Colombia.

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'[T]he nearest relative of someone who died as a result of the conflict in and about Northern Ireland, from January 1966, should receive a one-off ex-gratia recognition payment of £12,000.'[1]

"There is no difference in a mother's tears. There can be no hierarchy of grief.""[2]

"It's blood money. It truly is the wages of sin… What this says to me is that the Government is prepared to pay Thomas Begley's family £12,000 for murdering my mum and my dad. … Those bombers set out to commit carnage, to bomb and to brutalise and to murder. How can their families be compensated for their murderous intent? … I will never accept this money. To accept it would be to besmirch my parents' memory, to acknowledge that they are just the same as the scum that murdered them."[3]

"I have often acknowledged, in my own case of losing my wife in the Shankill bomb, that the mother of the bomber Thomas Begley hurts much like myself. … I believe Mrs Begley should receive all the help society can give her to help her deal with her tragedy; but I have always stopped short of suggesting that that should be monetary in nature. There is something about money that changes the dynamic of how we view situations like this."[4]

On a sunny Saturday afternoon in October 1993 a bomb ripped through a busy fish-and-chip shop in Belfast, killing ten people and seriously injuring 57 others. Two members of the Provisional IRA had planted the bomb in an attempt to kill members of the loyalist UDA group, who they thought were meeting in the room above the takeaway. The bombers intended to give a warning to those in the fish-and-chip shop, but the bomb prematurely detonated killing one of the bombers, Thomas Begley, and a UDA member, Michael Morrison and his family, as well as seriously injuring the other bomber, Sean Kelly. In 2009 proposals by the Consultative Group on the Past to address the legacy of the Troubles, included a recognition payment for every family who lost a loved one. However, it was met by protests that the family of Thomas Begley and other paramilitaries who were killed would be eligible for the payment, and as a result the proposals were abandoned.[5] The quotes above reflect this contention

[1] Report of the Consultative Group on the Past in Northern Ireland, (2009), p92.
[2] Reverend Lord Eames, Co-Chair of the Consultative Group on the Past. Olga Craig, 'It's blood money – truly the wages of sin', *The Telegraph*, 31 January 2009.
[3] Michelle Williamson, daughter of civilians George and Gillian Williamson who were killed in the Shankill bombing in October 1993. Olga Craig, 'It's blood money – truly the wages of sin', *The Telegraph*, 31 January 2009.
[4] Alan McBride, who lost his wife Sharon and father-in-law Desmond Frizzell (both civilians) in the Shankill bombing on 23rd October 1993. Alan McBride, Hierarchy Of Victims: A Question of Hierarchy, *WAVE Trauma Centre Newsletter,* February 2009, p26.
[5] Protestors carried placards proclaiming 'The Wages of Murder is £12,000' and 'Terrorism Pays apparently'. See Owen Bowcott, Protests disrupt launch of Northern Ireland Troubles payout proposals, *The Guardian*, 28 January 2009.

between proposed legal boundaries, moral invocation of victimhood and the personal views of two victims in providing reparations to perpetrators who suffer.

Recognising who is a victim in the aftermath of mass violence and conflict can be morally and politically controversial, owing to contested narratives of victimhood. 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 individuals or groups.[6] 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 time.[7] This is only brought into sharper relief with the issue of reparations, which seek to acknowledge individuals as victims through tangible and symbolic remedies made by those responsible for their suffering. Reparations have increasingly become a normative part of transitional justice processes in remedying victims' harm, complementing more perpetrator-focused criminal trials. Transitional justice itself has been purported to be 'victim-centred', but this raises questions as to who is recognised as a victim and which voices are prioritised in shaping and benefiting from reparation policies. 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.

The purpose of this article is to challenge simplistic discourses of victimhood to be more composite in addressing victimisation and responsibility by including victim-perpetrators in reparation mechanisms. It is hoped that such an approach can navigate such issues of the eligibility of victim-perpetrator or complex victims for reparations without being a source of victimisation and future violence. This article begins by outlining how victimology has grappled with complex victims and political discourses use of victimhood to establish legitimacy and avoid responsibility. Developing Bouris's 'complex political victim' this article explores how

[6] Mike Morrissey and Marie Smith, *Northern Ireland after the Good Friday Agreement: Victims, Grievance and Blame,* Pluto Press (2002), p4.
[7] See Tristan Anne Borer, A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa, *Human Rights Quarterly* 25(4) (2003) 1088–1116.

reparations for complex victims are theorised in the literature and practice of transitional justice. Victim responsibility has been insufficiently examined when addressing collective violence. This piece argues that while international and human rights law recognise all victims' right to reparation, political discourses during transitions from authoritarianism or conflict distinguish victim-perpetrators, continuing the narrative of violence through political, moral and legal means. The second part of this article evaluates how complex victims have been included or excluded in reparation programmes in different transitional contexts. This article identifies that most of the reparation mechanisms and literature on transitional justice concentrates on state responsibility, leaving little space for complex victims who do not fit within such a narrative of the past. The final section evaluates alternative approaches in including complex victims in remedial or assistance programmes. This article hopes to untangle the messiness of identities in conflict to return to a nuanced notion of justice, which can more effectively address the past. As Bouris highlights the dangers of excluding complex victims, this article suggests ways in which victim-perpetrators can be included within reparation programmes without undermining goals of accountability or reconciliation.

A. Conceiving victimhood and responsibility

Victimhood and responsibility for victimisation seem diametrically opposed; this section seeks to theoretically map out the two areas under 'innocent' and 'complex' victims. For the purposes of clarity 'innocent' victims refers to those individuals who are not members of armed groups, i.e. civilians, with 'complex' victims denoting those who have been victimised, but are responsible for victimising others, with victims referring to both categories.

1. Innocent victims

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.[8] The victim label can bestow sympathy, praise, or benefits on an individual as it recognises that they have

[8] Richard Quinney, Who is the Victim? *Criminology* 10 (1972) 314-323, p321.

suffered.[9] As such, Christie postulates the 'ideal victim' as society's construction of what a victim should be.[10] The ideal victim is innocent, vulnerable, very young or very old, and a good citizen who has been attacked by a bad offender who is a stranger.[11] This construction of the 'innocent victim' serves to contrast the 'wicked' perpetrator, insurgent, or terrorist, who is distinguished as evil, uncivilised, and deserving of punishment or reciprocal violence.[12] This characterisation fits into retributive discourses, simplifying and distorting the occurrence of violations where such identities do not always exist.[13] For those individuals denied recognition as victims, because of their past actions or association, it may cause stigma, emotional trauma, and self-blame. Yet, there is a danger of individuals as 'ideal victim' to be represented as passive and vulnerable, unable to help themselves or contribute to wider political or legal processes.[14]

The political construction of 'innocent' 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 and post-conflict societies can perpetrate a very powerful moral conception of victimhood.[15] 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.[16] Such a perspective can drift into 'moral relativism', whereby an individual or group can blame their situation, context or structural factors for committing atrocities.[17] As a result it can legitimise violence against individuals,

[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.
[10] See Nils Christie, Conflicts as Property, *British Journal of Criminology* 17(1) (1977) 1-15.
[11] Ibid p19.
[12] David Becker, Elizabeth Lira, María Isabel Castillo, Elena Gómez, and Juana Kovalskys, Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation, *Journal of Social Issues*, 46 (3) (1990), 133-149, p135.
[13] Kieran McEvoy and Kirsten McConnachie, Victims and Transitional Justice: Voice, Agency and Blame, *Social and Legal Studies,* 22(4) (2013) 489-513, p502.
[14] Anne-Marie McAlinden, Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse: Hierarchies, Blame and the Good/Evil Dialectic, *British Journal of Criminology,* (2014) 54 (2), 180-198, p190.
[15] See Erica Bouris, *Complex Political Victims,* Kumarian (2007).
[16] See David Bar-Tal, Lily Chernyak-Hai, Noas Schori, and Ayelet Gundar, A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts, 91(874) *International Review of the Red Cross,* June 2009, 229-258.
[17] McEvoy and McConnachie n.17, p502.

impose collective guilt on groups and people, or deny recognition of certain victims. This conflicts with the more objective, normative wrongfulness of such atrocities in international law, where victimhood is based on harm, rather than responsibility or belonging to a particular group. In the case of the Shankill bombing, the civilians killed, such as Michelle Williamson's parents or Alan McBride's wife and father-in-law, were individual citizens carrying out ordinary daily tasks, unlawfully killed by harm caused by the bombers Thomas Begley and Sean Kelly.

McEvoy and McConnachie argue that the juxtaposition of victimhood and perpetration in 'claim-making' on identity and justice are even more explicit in transitional contexts than in domestic justice, as 'the 'innocent' victim is placed at the 'apex of a hierarchy of victimhood and becomes a symbol around which contested notions of past violence and suffering are constructed and reproduced.'[18] This is apparent in the 'Troubles' in Northern Ireland or the Israeli/Palestinian conflict, where different actors use their past communal victimisation to construct moral justification and legitimacy of their violence against the other side.[19] Such construction of victimhood and legitimacy can leave little space for complex identities. Moreover, the conceived vulnerability of victimhood and weak inclusion of victims' rights in transitional justice mechanisms enables political actors to appropriate victimhood for their own gain.

2. Complex victims

This article takes a more 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, in that they can also be responsible for their actions. Analysis of a victim's responsibility for causing harm to others or themselves is not new, but has waned in recent decades. Early positivist research in victimology was concerned with understanding victims' responsibility in their own victimisation, looking in particular at their actions,

[18] Kieran McEvoy and Kirsten McConnachie, Victimology in transitional justice: Victimhood, innocence and hierarchy, *European Journal of Criminology*, 9(5) (2012) 527-538, p532.
[19] See Bar-Tal et al. n.20; Morrissey and Smyth n.8, p5; and Luc Huyse, Victims, in D. Bloomfiled, T. Barnes and L. Huyse (eds.), *Reconciliation after violent conflict: A handbook*, IDEA (2002), 54-65, p62.

characteristics, and circumstances that provoked the perpetrator to commit an offence.[20] However, positivists failed to appreciate the impact of social structures upon victimisation, and resulted in 'victim blaming'.[21] More critical accounts of victimology have attempted to uncover hidden or unrecognised victimisation by examining 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.'[22] 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 as a result of a crime.[23] Yet, such concerns in domestic victimology may not capture the experience of victimhood in collective violence.

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.[24] As Borer points out victims and perpetrators of collective violence are not homogenous, nor always diametrically opposed, but can coincide.[25] The 'messy' reality of these situations or 'grey zone' 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.[26] 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,[27] but to understand the personal, social, and political context in which victimisation occurs.

To ignore the responsibility of complex victims perpetuates a universal definition of victimhood that everyone was victimised and suffered in equal amounts.[28] Yet this denigrates

[20] See Hans Von Hentig, *The criminal and his victim: Studies in the socio-biology of crime,* (Archon 1967).
[21] Rob Mawby and Sandra Walklate, *Critical Victimology: International Perspectives,* (Sage 1994), p11-12.
[22] Mawby and Walklate ibid., p177.
[23] McEvoy and McConnachie n.22, p530.
[24] Collective violence is used here to cover war crimes, crimes against humanity and genocide.
[25] Borer n.7, p1091.
[26] McEvoy and McConnachie n.17, p494; and Primo Levi, *The Drowned and the Saved,* (Abacus 1989).
[27] See Laurence M. Thomas, Suffering as a moral beacon: Blacks and Jews, in H. Flanzbaum (ed.), *The Americanization of the Holocaust*, Johns Hopkins University Press, 198–210 (1999).
[28] Borer n.7, p1111.

the personal, traumatic, and continuing suffering of many individuals. Morrissey and Smyth suggest that such universalistic definitions of victimhood of 'we are all victims' also has the effect of allowing those responsible to escape their guilt or shame, and 'promote a culture of powerlessness and undifferentiated chaos.'[29] 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.[30] The risk with complex victims is that by recognising perpetrators as victims it could be used to legitimise their violence against others and avoid their responsibility in victimising others.[31] 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.[32] Accordingly a nuanced approach is needed to reflect that some individuals can be both victimised and victimiser. It is only through developing a 'thicker' multi-perspective of victimisation can we understand how to address such harms in terms of reparations.[33]

This article takes a critical approach by recognising individuals, such as the UDA member Michael Morrison killed in the Shankill bombing, 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 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

[29] Morrissey and Smyth n.8, p4; and Huyse n.23, p62.
[30] Morrissey and Smyth ibid., p7.
[31] Ibid.
[32] Jemima Garcia-Godos, Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation, *International Journal of Transitional Justice* 2(1) (2008) 63-82, p79.
[33] Kieran McEvoy, Beyond Legalism: Towards a Thicker Understanding of Transitional Justice, *Journal of Law and Society* 34(4) (2007) 411-440.

effectively remedy harm; and (3) undermining the long term prospects of peace by leaving such suffering unaccounted and unresolved.[34]

For the purposes of this article the complex identity of victim-perpetrator (complex victims) refers to individuals who are members of non-state armed, paramilitary or terrorist groups, or state forces who commit political violence, but have been victimised through identifiable 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.[35] Including complex victims in reparations mechanisms may cause political instability, as the case in Northern Ireland, but legally and morally there are grounds to include such individuals. Even though complex victims may be responsible for committing atrocities, it does not place them outside the law or access to an effective remedy for their suffering, as they still have 'moral worth and dignity'.[36] As such private law and human rights law, discussed further below, do not apply the doctrine of clean hands for intentional trespasses against the person or serious human rights violations.[37]

This definition of complex victims as eligible for reparations is likely to exclude those who suffer by their own hands or from violations that do not rise to the severity of torture or sexual violence. In the case of the Shankill bombing with Thomas Begley (IRA), Sean Kelly (IRA) and Michael Morrison (UDA) were all members of paramilitary groups that carried out violence, and were all killed or injured, but it is likely that only Morrison suffered unlawful violence by another and could be considered a complex victim, with the family of Begley as

[34] Bouris n.19, p75.
[35] M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, *Law and Contemporary Problems* 59 (1996) 63-74.
[36] Ernesto Verdeja, A Normative Theory of Reparations in Transitional Democracies, in C. Card and A.T. Marsoobian (eds.), *Genocide's Aftermath: Responsibility and Repair*, Wiley-Blackwell (2007), 166-185, p178.
[37] See Lisa Laplante, The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition, *American University International Law Review*, 23(1) (2007), 51-90.

indirect victims, due to the loss of a loved one. Temporality is an important consideration, in that complex victims are perpetrators first then victimised, in comparison to victims, who are victimised without any fault of their own. The difference being that with complex victims, they are victimised due to their belonging to an armed or illegal group that is committing atrocities, but end up suffering unlawful force. Whereas innocent victims are victimised, but are not responsible for their suffering. 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 remedial measures by responsible actors to repair the harm caused, it is worth discussing its use in transitional justice in more detail.

B. Constructing reparations for complex victims in times of transition

Reparations are an important part of many transitional justice processes, both in alleviating victims' suffering and to balance concessions and demobilisation packages made to combatants.[38] For victims reparations are important in acknowledging and remedying their suffering, as well as providing more tangible means to improve their quality of life.[39] Reparations in transitional justice can be rooted in diverse goals of accountability, reconciliation and peace building, masking tensions between them in practice.[40] Reparations can also be contentious owing to competing demands, in particular from victims who are seen as key stakeholders due to their suffering. However, victims are at best consultees, not decision-makers in transitional justice as other parties and societal interests have to be

[38] See Pablo de Greiff, DDR and Reparations: Establishing Links Between Peace and Justice Instruments, in K. Ambos, J. Large, and M. Wierda (eds.), *Building a Future on Peace and Justice*, (Springer 2009), 321-355; and the Final Report of Sierra Leone Truth Commission, Vol.II, Chapter 4, paras.34-39, and 69.
[39] TRC Report, Vol.V, Chapter 5, p174.
[40] Christine Bell, Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field', *International Journal of Transitional Justice* 3(1) (2009) 5-27.

considered.[41] A key issue is how victimhood and eligibility for reparations is constructed both in terms of process and outcome during times of transition.

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.[42] Reparation processes can send political messages about the value of certain individuals and their inclusion within the new political order, rebuilding civic trust with the state and its citizens.[43] Yet as Teitel suggests, the harm caused to individuals and society is 'potentially limitless'.[44] 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 continue to suffer from the physical, psychological or economic consequences of collective violence, such as disappearances, extrajudicial executions, sexual violence, torture, and serious injuries.[45]

Determining who can claim reparations in countries that have experienced mass violence is a politically fraught process.[46] 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.[47] The law instead 'organises irresponsibility' enabling contested notions of victimhood to prevail by prioritising responses to certain victims over others. The

[41] See Luke Moffett, *Justice for Victims before the International Criminal Court,* (Routledge 2014), p31.
[42] Pablo de Greiff, Justice and Reparations, in P. de Greiff (ed.) *The Handbook of Reparations,* (OUP 2006), 451-477, p454.
[43] Ibid.; Brandon Hamber, The dilemma's of reparations: In search of a process-driven approach, n K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), O*ut of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations,* Intersentia, (2006), 135-149, p141-142.
[44] Ruti Teitel, *Transitional Justice,* (OUP 2002), p134.
[45] In Sierra Leone, see TRC Final Report Vol. II, Chapter 4; *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR),* (2006) Part 10, para.175; and the Final Report of the Kenyan Truth, Justice and Reconciliation Commission, (2013) Vol. IV, p97-122.
[46] Huyse n.23, p58.
[47] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering*, Routledge-Cavendish (2007), p31.

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.[48] 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.[49] 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. Yet, the exclusion of certain victims can undermine other goals of reparations, such as reconciliation.[50]

The issue of complex identities of victims has not really featured much within transitional justice theorisation of reparations. As Fletcher states,

> Victims are never a simple, unidimensional category, either in terms of their own complex needs or in terms of the fluidity of identities that characterize an ongoing conflict…. The constructed nature of victims in transitional justice works against addressing the complex nature of victims' experiences and identities. They may hold multiple and conflicting views, certainly collectively but also individually, that transitional justice is ill equipped to address.[51]

The absence of complex victims from reparations can be partly explained on the basis that many countries with reparation programmes were constructed around atrocities committed by the former authoritarian regime, such as in Latin America 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

[48] See Claire Moon, 'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering, *Social and Legal Studies* 21(2) (2012) 187-199.
[49] Ibid., p194.
[50] Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A Case-Study on Rwanda* (Intersentia 2004), p496.
[51] Laurel Fletcher, Editorial Note, *International Journal of Transitional Justice*, 8(1) (2014), 1–5, p2-3.

its citizens. Although a human rights approach, discussed further below, promotes 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 can be easier to identify, as it is an anonymous entity, civilians are generally acknowledged as victims.[52] There remain challenges in providing reparations to complex victims. The following sub-section discusses the political contention around reparations for complex victims, before moving onto examine 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 also be explained by them coming into conflict with demands of other victims or public perceptions. From a critical victimological perspective complex victims are unseen and unheard, as their suffering does not fit into socially accepted values of innocence and law-abiding citizens. As outlined at the start of this article in relation to the Shankill bombing, 'innocent' victims, such as civilians, may find it abhorrent that those who victimised them or others are eligible for reparations. The public may share such sentiments, which can impact the political viability of recognising complex victims for reparations. Starzyk et al suggest that reparations are more likely to be publicly accepted or sociably feasible where they do not compromise social values.[53] Nussio et al also point to other factors that prompt reparations, such as more left-leaning political ideology or group-based or collective guilt, together underscoring the significance of public support in the viability and sustainability of reparations.[54] At least in Colombia context, Nussio et al research suggests that the social desirability of redress is

[52] Huyse n.23, p62.
[53] Katherine Starzyk, Danielle Gaucher, Gregory Boese and Katelin Neufeld, Framing reparation claims for crimes against humanity: a social psychological perspective, in J. Wemmers (ed.), *Reparations for Victims of Crimes Against Humanity*, (Routledge 2014), 113-125.
[54] Enzo Nussio, Angelika Rettberg, and Juan E. Ugarriza, Victims, Nonvictims and Their Opinions on Transitional Justice: Findings from the Colombian Case, *International Journal of Transitional Justice*, 9(2) (2015) 336-354, p343.

connected to moral determinations of victimhood with 70% of respondents supportive of reparations where only innocent victims received them.[55]

Complex victims 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.[56] 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.[57] 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.[58] 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.[59] 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.[60]

There is a danger in theorising reparations and implementing them in practice for 'innocent victims', it may exclude those complex victims who have suffered from comparable harm.[61] By allowing their suffering to remain unacknowledged it perpetuates impunity for such crimes against certain individuals, undermining the *jus cogens* nature of such violations and

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[55] Ibid. p352.
[56] See Judith L. Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror*, River Oram Press (1994).
[57] See Bouris n.19; and McEvoy and McConnachie n.22, p532.
[58] Huyse n.23, p64.
[59] Viktor E. Frankl, *Man's Search for Meaning*, Washington Square Press (1985), p99; and Herman n.52.
[60] Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, The right to reparation for victims of gross and systematic violations of human rights, in Feyter et al. n.51, 455-499, p470.
[61] See Cristían Correa, Inter-American Court's Dangerous Precedent in Limiting Insurgents' Right to Reparations, JusticeInfo.net, 2nd September 2015.

denying the dignity of complex victims. Similarly if only 'innocent 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 peacemaker. The final section of this article posits that the law during transition can be crafted to encompass such complex identities, while maintaining goals of accountability and reconciliation for reparations.[62]

Complex victims are different from 'innocent' victims in that they are responsible for victimising others. This requires a more nuanced approach in reconciling their responsibility with acknowledging their victimisation. In the case of the Shankill bombing, Michael Morrison (UDA), can be considered a complex victim, as although he was involved in an illegal paramilitary group, he was unlawfully killed in the bombing and would likely be eligible for reparations. In contrast the IRA bombers Thomas Begley and Sean Kelly, who were respectfully killed and injured, would not be considered complex victims as they were harmed by their own conduct in planting the bomb. Private law principles would prevent an individual for claiming a remedy he/she had caused by their own hand. [63] A further distinction could be made between direct and indirect victims, i.e. family members of the bombers as indirect complex victims but not the bombers. The responsibility of the bomber does not transfer to their family, who have suffered a loss, such as Begley's family. However, given that the bomber caused harm to others, the family as indirect victims would only be eligible for more general assistance or services, such as rehabilitation, as they would be unable to establish harm suffered by unlawful actions of another. Distinguishing innocent from complex victims not only brings into question whether they should benefit from reparations, but also what procedural role complex victims play in the negotiation, consultation and process of

[62] McEvoy and McConnachie n.17, p505.
[63] See James Goudkamp, Ex turpi causa and immoral behaviour in the tort context, *Law Quarterly Review* 127(Jul) (2011), 354-358.

reparations programmes. Accordingly the purpose of this article 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 with the dominant political narrative of the wrongfulness of the state's actions or encouraging reconciliation, such as in Chile and Sierra Leone.[64] 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.[65] That said violence by non-state actors in Argentina and Brazil was diminutive in comparison to atrocities committed by state forces. In other transitional justice contexts reparations can be as Hazan suggests 'transactional', such as the case with South Africa where 'the perpetrators obtained amnesty, and the victims received reparations in exchange.'[66] Borer and others have highlighted that in South Africa this dichotomy did not capture the composite grey zone of identities, nor 'perpetrators [who] are simultaneously victims'.[67] A number of complex victims were recommended by the TRC for reparations.[68] In contrast to the transitional justice literature on reparations that concentrates on authoritarian

[64] See Elizabeth Lira, The Reparations Policy for Human Rights Violations in Chile, in de Greiff n.50, 55-101; and Sierra Leone TRC Report Vol.II, Chapter 4, paras.69-70.
[65] Argentina (Laws 24,043, 24,441, and 25,914); and in Brazil (Laws 9,140 and 10,559).
[66] Pierre Hazan, Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice, *International Review of the Red Cross*, 88(861) 19-47 (2006), p44.
[67] Borer n.7; and Tshepo Madlingozi, Good victim, bad victim: Apartheid's beneficiaries, victims and the struggle for social justice, in W. Le Roux (ed.), *Law, Memory and the Legacy of Apartheid: Ten years after AZAPO v President of South Africa*, (2007) 107-126, p114.
[68] E.g. three members Afrikaner Weerstandsbeweging 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. Ontlametse Bernstein Menyatsoe Applicant (AM 7498/97), 5 August 1999. Borer also gives the example of Winnie Mandela, n.7, p1098-99.

regimes or state violations, the rest of this section discusses how complex victims have been included and excluded from reparation programmes in situations closer to internal armed conflict, where state and non-state actors committed violence in the contexts of Colombia, Peru and Northern Ireland.

In Colombia the 2005 Justice and Peace Law constructs victimhood and primary responsibility for reparations around crimes committed by illegal armed groups, avoiding the responsibility of the state in atrocities. Only in the 2011 Victims and Land Restitution Law could claims be made against state forces, after pressure by victim groups on the Colombian government.[69] That said the 2011 Law excludes members of illegal groups from claiming reparations to deny the legitimacy of their struggle, despite some of them suffering from gross violations of human rights.[70] Children or minors in such groups do however have access to reparations if they are minors at the time of demobilisation.[71] Furthermore, family members and dependents of members of non-state armed groups are able to claim reparations as direct victims of violations, but not for indirect victimisation where violations are committed against members of armed groups.[72] This is in contrast to members of the Colombian armed forces who are recognised as victims with access to reparations, without any distinction with those who are responsible for committing violations.[73] For those individuals killed by state forces, a criminal investigation needs to be completed to determine that the person was not a member of an illegal armed group to claim reparations. Yet these investigations rarely reach a conclusion, with the effect of excluding numerous victims from reparations in attempt to establish 'innocence'.[74]

In Peru controversy remains around complex victims claiming reparations. The Peruvian Truth and Reconciliation Commission (CVR) recommended reparations, which were

[69] Articles 5, 42, and 45, Law No.975 of 2005; and subsequent Article 3, Ley de Víctimas y Restitución de Tierras, Ley (2011); Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012), p214-215.
[70] Article 3(5), Ley de Víctimas y Restitución de Tierras, Ley (2011).
[71] Article 3(2).
[72] Ibid.
[73] Article 3(1).
[74] The Victims and Land Restitution Law, *Amnesty International,* 23/018/2012 (2012), p8.

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'.[75] Although such 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.[76]

The 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.[77] This approach also risks excluding many individuals in Peru who were wrongly convicted of membership of illegal armed groups, but allow those who were never identified to access reparations.[78] Such a broad distinction prevents vulnerable individuals within such communities to access an effective remedy, such as children who were members of illegal groups at the time.[79] This brings into question the remedial effect and contribution to reconciliation of reparations when they can be a source of victimisation by excluding individuals of grave atrocities.

In contrast to these contexts, discussions on reparations in Northern Ireland in dealing with the past have been virtually non-existent, given the contested nature of which victims

[75] CVR Vol. IX, p149 and 153; and Rebecca K. Root, *Transitional Justice in Peru*, Palgrave MacMillan (2012), p131.
[76] Root ibid., p133; and CVR Report Annex 2, p13.
[77] See Root ibid., p134.
[78] Ibid., p136.
[79] Ibid., p133.

should be acknowledged and who is responsible, with greater attention on truth and justice.[80] As mentioned above, 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 recognised 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.[81] Nonetheless, this one recommendation proved politically controversial, as the family of bombers, such as Thomas Begley, would be eligible with no account of their responsibility, 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.[82] 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.[83]

In these different contexts we can see that who is acknowledged as a victim is politically contested. It is apparent in Northern Ireland and Peru that the discourse of victimhood and innocence is used by elites to advance their political agenda to seize the apparent moral high ground and narrative of the conflict. That said a more nuanced picture emerges in the distinction between complex victims and their family members (indirect victims). In the context of Colombia, 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 denied such remedial measures. Such a distinction reflects the personal

[80] See Cheryl Lawther, *Truth, Denial and Transition: Northern Ireland and the Contested Past,* Routledge (2014), 52-75.
[81] CGP n.1, p92.
[82] Marie Breen-Smyth, *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland,* Wave (2012).
[83] See Independent Commission on Policing for Northern Ireland (Patten Commission), Final Report (1999).

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 broad approaches. In South Africa there was a more unified picture of responsibility, with amnesty for individuals and the state assumes responsibility for reparations, reflecting a wider discourse on reconciliation.[84] Nonetheless, such a myopic view of responsibility is a legal fiction, which covers up the messy reality of the complex web of victimisation and responsibility that characterises collective violence, where individuals, states and non-state actors can be responsible for violations that may give rise to obligations for reparations. 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 individuals can be held responsible for violations that can arise to obligations for reparation.[85] 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.

The distinction of responsibility is tied to underlying discourses of legitimacy, whereby 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. The general distinction between 'ideal victims' of victimised innocent civilians and state forces serving their community who are able to claim reparations, against the suffering of complex victims, reinforces a hierarchy of victims,

[84] See *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others,* (CCT17/96) [1996] ZACC 16.
[85] See Luke Moffett, Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda, in N. Gal-Or, C. Ryngaert, and M. Noortmann (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, (Brill 2015), 323-346.

where some suffering is deserved and there is no equal value for human life, dignity, and personal integrity.[86] 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-bind', 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.

C. Navigating conflicting identities

Complex identities of victim-perpetrators can be navigated through other mechanisms. This section examines how claims over identity are dealt with through reparations in human rights law and development or services offered to affected communities. The human rights approach comes into sharper conflict with socio-political constructions of victimhood and eligibility for reparations of victim-perpetrators as it is only concerned with the responsibility of the state; whereas the provision of assistance or services takes a more nuanced perspective. Ultimately these alternative approaches to state administrative reparation mechanisms narrowly construe victim-perpetrators responsibility or over look it entirely. At the same time such alternatives can encourage states to include complex victims in reparation programmes or at least alleviate their suffering through more discreet assistance.

1. Human Rights and Reparations

Reparations have long been associated in human rights law as remedial measures to 'promote justice by redress'.[87] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations (UNBPG) defines 'victim' broadly to include direct and indirect victims who suffer

[86] Garcia-Godos n.38, p79.
[87] Principle 15, A/RES/60/147.

harm.[88] 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 on the worth of an individual that has nothing to do with the injury suffered.'[89] Otherwise this would undermine the objectivity of such a determination by basing such decisions on moral, rather than legal responsibility.[90] 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.[91] 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 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 in the past has distinguished complex victims from claiming reparations. In *McCann and others v United Kingdom* British special forces killed three members of the IRA 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.'[92] 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.[93] Considering the

[88] Principle 9.
[89] Dinah Shelton, *Remedies in International Human Rights Law*, (OUP 2005), p72.
[90] Ibid., p72 fn.136 citing Brigitte Stern, *Le prejudice dans la théorie de la responsabilité international* (1973), p314.
[91] *Selmouni v France,* (Application no. 25803/94, 28 July 1999) para.95; and *Ireland v United Kingdom,* (App no 5310/71, 13 December 1977), para.163
[92] *McCann and other v the United Kingdom,* (Application no. 18984/91) 27 September 1995, para.219.
[93] For instance see *Kelly and Others v United Kingdom,* Application no. 30054/96, 4 May 2001.

disproportionate use of force in the *McCann* case, it is likely that the claim of reparations could be decided differently today. In 2013 the Grand Chamber in the *Del Río Prada v Spain* case disregarded the applicant's background in ETA, being more concerned with the Spanish government's breach of its obligation under Article 5(1) on lawful detention.[94] In other cases the Court not entirely avoiding the context of violations and moving to remedying individual, leaves the door open to consider the actions and responsibility of complex victims on nebulous grounds of 'equity'.[95]

In contrast, the Inter-American Court of Human Rights has until relatively recently 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. 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, and then failed to conduct an effective investigation.[96] Although 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.[97] However, the Court rejected these claims and awarded substantial compensation to victims and their next of kin, as well as for the state to provide other forms of reparations.[98]

In subsequent proceedings on interpretation of the judgment in *Miguel Castro Castro Prison,* the Peruvian government sought to push their point that the victims as convicted 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

[94] Cf. Joint Partly Dissenting Opinion of Judges Villiger, Steiner, Power-Forde, Lemmens and Griţco in *Del Río Prada v Spain*, Application no. 42750/09, 21 October 2013.
[95] *Al-Skeini and Others v the United Kingdom,* (Application no. 55721/07), 7 July 2011, para.182.
[96] *Miguel Castro Castro Prison v Peru,* Merits, Reparations and Costs. Judgment 25 November 2006, Series C No.160.
[97] Ibid., paras.135 and 142.
[98] Ibid., paras.410-469.

awarding reparations to such complex 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.[99] 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 their criminal acts, distinguishing it from a criminal court and determining individual criminal responsibility.[100] 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. On the one hand 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. Yet on the other hand, it vindicates the dignity and right to remedy for complex victims that they should not have been subjected to such wrongful atrocities.

Human rights jurisprudence is important in two respects in the difficulty of reparations in providing a just solution in dealing with complex victims: non-discrimination; and state responsibility. With the first issue human rights courts generally follow the principle of non-discrimination when it comes to holding the state responsible for violating human rights obligations. Thus regional human rights courts generally take a more objective analysis. However, the right to reparation as vindication of 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 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 could cause political strife, as only a handful of victims are able to access regional human rights courts, causing an imbalance between

[99] *Miguel Castro Castro Prison v Peru,* Interpretation of the Judgment on Merits, Reparations and Costs, Judgment 2 August 2008, Series C No.181, paras.29-30.
[100] Ibid. para.40.

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.[101] Perhaps as a result of this domestic political pressure two recent cases before the Inter-American Court perhaps reflect that the court is becoming more sensitive to state arguments on complex victims and the legitimacy of its reparation orders, by limiting compensation or awarding only rehabilitation to family members of hostage takers extra-judicially killed by state forces.[102]

Ultimately the human rights approach by itself fails to capture the larger complex web of victimisation and responsibility that characterises collective violence. In general human rights law represents important moral values inherent in a rights based approach, but perhaps does not sufficiently countenance the more complex political and social values in constructing reparations after internal armed conflict. In the sense that human rights law affirms 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 individuals and groups that complex victims are responsible for victimising, they may have to provide reparations to their victims, but they should have a similar right to remedy against those who victimised them, i.e. the state.

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

In contrast to individual rights and awards of reparations in human rights law, states have grouped victims and affected communities 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 community reparations

[101] See Root n.88.

[102] Irma Franco Pineda in *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia*, Judgment of 14 November 2014 (Preliminary objections, merits, reparations and costs), Series C No. 287, paras.587, 594, and 596; and *Cruz Sánchez et al. v Peru*, Judgment of 17 April 2015, (Preliminary objections, merits, reparations and costs), Series C No. 292, para.463.

have been promoted in the context of collective violence to provide assistance and support to victims. These more collective responses can be more nuanced, avoiding questions of benefitting complex victims, as they assist not just victims, but everyone in a particular area. Moreover such approaches can be more inclusive not just in their outcomes, but also in the decision-making processes, enabling communities better ownership and oversight of their design.[103] 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.[104]

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. In terms of development the government has often declared these programmes are reparations, such as Northern Ugandan Social Action Fund (NUSF) and the Peace Recovery and Development Plan (PRDP).[105] Yet, 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. Moreover, such development avoids the responsibility of the state in atrocities its forces committed.

The northern Uganda conflict also created a large grey zone of complex victims, where tens of thousands of individuals were abducted by the LRA or organised in to local self-defence units by the government.[106] 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. Yet by absolving all individuals of reparations and providing

[103] See Pamina Firchow, The Implementation of the Institutional Programme of Collective Reparations in Colombia, *Journal of Human Rights Practice* 6(2) (2014) 356–375.
[104] See de Greiff n.50, p470.
[105] President asks Acholi to let go of past, *Daily Monitor*, 29 November 2011. Interview with government official, Kampala, April 2015.
[106] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Book 2006).

ex-combatants assistance, it has caused resentment amongst other victims and communities, as one Northern Ugandan said, 'I am a victim, but I do not have the benefits of a perpetrator who is also a victim.'[107] In all the provision of demobilisation packages to perpetrators and general assistance to affected communities, reflects that the needs of victims are neglected and undermines notions of transactional agreements being made between different stakeholders in dealing with the past.[108]

The second type of general assistance is 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 were established to support victims through numerous victim groups.[109] 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'.[110] The inclusive nature of the definition was intentional to avoid contention over eligibility for service provision, reflecting more humanitarian concerns than accountability.[111] Services provided to victims are funded now through the Victims and Survivors Service (VSS), and reviewed through the Commission for Victims and Survivors.[112] 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 victims, as service provision loses the recognition, entitlement and responsibility aspects associated with reparations, by their delivery through groups. In terms of remedy, services provided have been criticised for their access issues,

[107] Interview, Gulu, 5 July 2011.
[108] Hazan n.79, p44.
[109] Principle 12, Part 6, Good Friday/Belfast Agreement 1998. See Kenneth Bloomfield, *We Will Remember Them*, (1998).
[110] S.3, Victims and Survivors (Northern Ireland) Order 2006.
[111] *Services for Victims and Survivors*, Northern Ireland Office (2005), p6.
[112] Services included counselling, befriending, respite breaks, chronic pain management and retraining schemes.

location, standard of provision, and ability to respond to victims' needs.[113] Nevertheless, complex victim, such as former paramilitaries or state agents who were victimised, are able to access services through groups, due to the broad and non-discriminatory definition of victimhood.

The third type of general assistance is community reparations, which are measures awarded to groups or communities identified as having suffered and can include symbolic measures, such as memorials. Community reparations can be more cost effective in offering acknowledgement to affected communities, 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.[114] They can also potentially benefit other victims who cannot provide evidence of their suffering for the purpose of individual compensation, but can benefit from the construction of a health centre in an area. In Peru and Colombia community collective reparations have complemented individual awards by broadening out the benefits of redress to a wider group of beneficiaries.[115]

Community reparation can be a double-edged sword, as they 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 reparations awarded to communities.[116] In the *Lubanga* case before the International Criminal Court, some victims criticised that community measures suggested by the Trial Chamber 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.'[117] As a result in the Kenyan case of *Ruto and Sang*, at least 47 victims pulled out of participating at the Court on the basis that

[113] See Interim Victims Commissioner's Report on the Services for Victims and Survivors: Addressing the Human Legacy (2007).
[114] Marieke Wierda and Pablo de Greiff, Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims, International Centre for Transitional Justice (2004), p6.
[115] See Root n.88, p131; and Firchow n.116.
[116] See Root ibid., p134.
[117] *Prosecutor v Thomas Lubanga Dyilo,* Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations, ICC-01/04-01/06-2869, 18 April 2012, para.16.

reparations would be ordered to the community, meaning that perpetrators who continue to live near victims would be able to benefit from the harm they caused.[118] On appeal the Court in the *Lubanga* case changed reparations from community awards to collective measures to identifiable victims, rather than the broader community, so that those who suffered harm could have some form of collective remedy based on Mr Lubanga criminal conviction, i.e. use of child soldiers.[119]

Development, services and community reparations offer alternative nuanced ways to approach assisting and remedying the harm suffered by all individuals without making distinctions in terms of responsibility. This in itself may promote reconciliation and peace, rather than accountability. These different approaches reflect the different goals of reparations and assistance to victims in times of transition. Nevertheless, such ambiguity of victimhood and responsibility undermines the meaningfulness of reparations as an effective remedy and as 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. Although Dixon points out from a bottom-up perspective that victims may not distinguish individual reparations from assistance where they are delivered in the same form, i.e. monetary awards or collective development, reparations carry a strong symbolic component that brings them into the 'politics of recognition' of who is seen as deserving of publicly acknowledged redress.[120] This can have an impact on the feasibility and implementation of reparations during transition.

3. **Acknowledging and redressing complex victims**

The human rights and development approaches represent two different ways to address reparations for complex victims. Human rights predominately does not discriminate against

[118] *Prosecutor 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.
[119] *Prosecutor v Lubanga,* Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-3129, 3 March 2015.
[120] Peter J. Dixon, Reparations and the Politics of Recognition, in C. Stahn, C. de Vos and S. Kendall (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, (CUP, forthcoming).

complex victims of gross violations, avoiding issues of responsibility of individuals, and concerned with remedying the harm caused by gross violations, but even this is subject to judicial discretion in each case, excluding some complex victims. In contrast development, services and community reparations are widely defined, but risk losing their remedial effect for victims. Moreover, development and services reinforce victims as vulnerable, dependent, objects of moral concern, undermining their agency and rights. Common to both is to ignore individual responsibility; yet by neglecting this important aspect it could cause secondary victimisation to those 'innocent' victims harmed by complex victims. 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 in international law, 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. Nonetheless, such international norms need to be flexible and reflect legal pluralism where reparations may need to be shaped to domestic contexts and victims' needs, so as to be socially feasible and acceptable.

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 who 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. Although this may create a hierarchy of victimhood, all those who suffered would be at least have their suffering acknowledged and access to some form of remedy. The difference would be to reflect that complex victims were involved in victimising others and so their redress should reflect their responsibility. For innocent victims it avoids reparations becoming a source of further victimisation by not equating them as the same as those who killed. Reparations may

create a hierarchy of victimhood based on suffering and responsibility, reflecting the messy reality of collective violence that not all victims or perpetrators are the same, where some got up in the morning to carry out their daily business, whereas others went out with the intention to kill or cause serious injury and must live with the consequences. That said limiting perpetrators from full reparation, perhaps does not capture the responsibility of facilitators or bystanders who allowed violence to occur.[121]

Alternatively compensation awards could have a symbolic amount deducted, i.e. 10%, to reflect their responsibility in victimising others. A tariff scheme could reflect the gravity of the offence and time since the complex victim's conviction and their victimisation, as well as their contribution to the peace process or reconciliation. Such reduction should be limited to a certain percentage (e.g. 30%) to maintain their reparative value to the complex victims, without undermining them as a remedy and symbolic worth. This is the emerging position from the Inter-American Court of Human Rights where in the Colombian and Peruvian hostage cases compensation was reduced or reparations limited to rehabilitation for family members.[122]

Another option may be to have a review panel that could assess complex victims, based on a series of criteria, such as gravity of the offence of which they were convicted, time since the crime, and continuing suffering. In the case of the Shankill bombing mentioned at the start of this article, a distinction could be made between the bomber Thomas Begley, who blew himself up, and the UDA paramilitary Michael Morrison who was killed as a result. Begley was responsible for killing himself, his suffering could be distinguished as being the result of unlawful violence caused by himself, thereby not eligible for certain reparations, such as compensation. As indirect victims, his family could avail of rehabilitation or collective reparations, such as inclusion of his name on a memorial, incorporating access to more general services and assistance to affected communities, than based on their victimisation. Whereas Morrison (UDA) could be included in compensation awards for being murdered, but as a member of an illegal armed group could have the compensation for his family reduced

[121] This is beyond the scope of this article. See Borer n.7.
[122] See fn.115.

by a symbolic amount. 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. It is important in terms of legitimacy and to limit hierarchies of victimhood that the responsibility of individual members of state forces is examined when it comes to reparations. Although this complex approach is likely to increase the administrative and evidential workload of reparation mechanisms, it helps to neutralise, or at least manage, contested identities and redress in a reasoned and remedial way.

D. Conclusion

As transitional justice has traditionally been rooted in accountability we hold onto simplistic definitions of identity and responsibility to help make sense of senseless violence. Yet in life, violence and human behaviour do not lend themselves to such superficial distinctions of innocent victims and guilty perpetrators. In contrast 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. This contention of identity is accentuated with reparations, which attempt to publicly remedy harm and acknowledge suffering by those responsible. As noted at the start of this article, failing to include complex victims within reparations mechanisms has the potential to reinforce innocent victim stereotypes, denying redress to those complex victims who have suffered from gross violations of human rights. This could undermine long-term prospects of peace by inhibiting remedial and accountability prospects, as well as broader goals of the transition of reconciliation and guarantees of non-recurrence of violence. For reparations to reconcile the acknowledgement and responsibility of complex victims it requires a more composite approach to accountability.

Reparations in transitional justice usually developed through large administration programmes, are usually a more political project than a juridical one, still 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 to 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 it gives little guidance on the responsibility of complex victims in victimising others.

A more composite approach to complex victims entails recognising individuals who suffer from gross violations of human rights and allowing them to claim reparations, but such victims would have limited reparations or reduced compensation to reflect their responsibility in victimising others. This distinction of complex victims could make reparations to them more socially feasible and morally palatable. 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, but insisting that every individual who suffers from mass atrocities has access to an effective remedy. Transitional justice at its core is concerned with transitioning societies away from violence. Key to this is transforming discourses of victimhood and violence into more nuanced and complex measures to remedy suffering and address responsibility. Failure to address serious victimisation in times of transition will leave the wounds of the past open to fester into new grievances and potentially legitimise the resurgence of violence. Complex victims, while 'guilty' or 'bad' victims, have still suffered serious harm and the new political order needs to be as inclusive as possible to comprehensively address the past. Reparations are a malleable transitional justice tool that can be crafted to deal with complex victimisation and stave off the return to violence.