

Reparation of Gross Violations of Economic, Social and Cultural Rights: A Work in Progress

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The purpose of this presentation is to affirm the indivisibility of human rights and demonstrate the pattern of international judicial and administrative practice in transitional processes addressing economic, social and cultural rights, in particular by recognizing their violation as subjects of prosecution and reparations. The chronological treatment indicates progress in two important tracks: (1) the treatment of gross violations of ESC rights as crimes and (2) the increasing role of victims and affected persons and communities in their adjudication and remedy.

Within the coverage of positive developments, in legal theory and practical implementation, lies another lesson. By taking stock of where international practice really is at present, we have a chance to see where we can and should be.

Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will ensure an equitable future. Therefore, they must form an example of such equity, not least gender equity, as a guiding precedent for institutions, laws and policies to follow. Thus, the vision of transitional justice extends well beyond the remedy for individual victims, but can form a blueprint for policies and programs for generations to follow.

At its root, transitional justice is modeled on criminal justice systems. However, where analogies to national criminal law have been necessary, those references have so far been insufficient to deal with the range of grievances, violations, disputes and remedial actions required in transitional societies, including those emerging from conflict and institutionalized repression. The corresponding crimes, in fact, originate in the law of war and, increasingly, in international human rights law. In view of the fundamental principle of the indivisibility of all human rights, the corresponding norms, in practice, make it difficult to separate and virtually impossible to exclude ESCR from the transitional justice process, if justice be our guide and objective.

Justice

In any successful liberation struggle, the tyrants may fall, but deep discrimination and deprivation remain the standing challenge. Systematic discrimination and inequality in access to resources, land, work, and housing have led to conflict or exacerbated the social tensions leading to it.¹ Transitional justice practitioners very likely will expose a range of discriminatory practices and violations of economic, social, and cultural rights. In their pursuit of “justice” is “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and

¹ Louise Arbour, “Economic and Social Justice for Societies in Transition.” *INTERNATIONAL LAW AND POLITICS* 40 (2007), pp. 8–9.

punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the wellbeing of society at large.”² As the UN Secretary General has observed:

The notion of ‘transitional justice’...comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.³

Evolving beyond the Cold War mentality that has distorted human rights theory with notions of hierarchy and “generations” of rights remains a challenge to bridge the false dichotomy creating obsessive classifications of rights that are found impractical and false when in their application. However, we stand at a crossroads at which international practice also increasingly serves as a guide.

Adjudicating ESCR Violations as Crimes and Abuses

The International Military Tribunal at Nuremberg (IMT), the post-World War II period, stands as a standard modern reference for treatment of ESC crimes in international criminal law. That is mindful of the fact that reparations in the form of respect for ESCR, including freedom to participate in indigenous culture and physical return from displacement date back much further in history. The oldest known norms of this kind arise from the Cyrus the Great Cylinder (539 B.C.), which abolished forced labor, prohibited oppression and terror, and guaranteed freedom of settlement and religion.

International Military Tribunal:

In the Nuremberg Trials, critical violations of ESCR were adjudicated under the auspices of two central themes; Germanization and spoliation. Germanization had as its goal the assimilation of conquered territories politically, culturally, socially, and economically into the German Reich. In order to achieve Germanization, the obliteration of the former national character of the conquered territories and the extermination of all elements which could not be reconciled with the Nazi ideology was required. The conduct associated with Germanization was forced displacement, deportation and/or population transfer of the inhabitants of occupied territories as well as the transfer and settlement of German nationals into occupied territories or settlements encircling occupied territories.⁴ Spoliation referred to the plunder, pillaging and destruction of public or private property and the exploitation of the natural resources and the people of the occupied territory.

² The UN Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” S/2004/616 (23 August 2004), p. 7.

³ Ibid., p. 8.

⁴ The earliest explicit mention of population transfer in an international legal document was the recognition of "forced resettlements" as a war crime in the Allied Declaration on German War Crimes, adopted by representatives of the nine occupied countries, exiled in London, in 1942. It stated, *inter alia*: “With respect to the fact that Germany, from the beginning of the present conflict, has erected regimes of terror in the occupied territories...characterized in particular by...mass expulsions...229 On 17 October 1942, the Polish Cabinet in Exile issued a decree on the punishment of German war crimes committed in Poland, which provided that life imprisonment or the death penalty would be imposed "if such actions caused death, special suffering, deportation or transfer of population."

The cases of Alfred Jodl and Alfred Rosenberg are exemplary of the prosecution of violations of ESCR as crimes against humanity and war crimes, namely, destruction of property, plunder of private and public property, and deportation.

The case of Alfred Jodl featured the extensive practice of home demolitions employed by Nazi troops in occupied Europe as part of the effort to Germanize conquered territories. From 1935 to 1938, Alfred Jodl was chief of the National Defense Section in the German High Command and, later, chief of the Operations Staff of the High Command of the Armed Forces. Jodl was accused of war crimes and crimes against humanity in his role in the German High Command for carrying out, “as a systematic policy, a continuous course of plunder and destruction.” On the territory of the Soviet Union the Nazi conspirators destroyed or severely damaged 1,710 cities and more than 70,000 villages and hamlets, more than 6,000,000 buildings and made homeless about 25,000,000 persons” in implementation of this systematic policy. On 28 October 1944, Jodl ordered the evacuation of all persons in northern Norway and the burning of their homes so as to deter them from aiding the Russians. Jodl testified that he opposed the operation, but Hitler had ordered it. He also testified that the order was not fully executed. However, the Norwegian government provided evidence that such a large-scale forced eviction did take place, and that 30,000 houses were damaged or destroyed. The IMT found Jodl guilty of all four counts of his indictment and he was sentenced to death.

Alfred Rosenberg’s case exemplified the practices of plunder and deportation. Rosenberg was an intellectual leader in the Nazi party and in 1940 was made the head of the Centre of National Socialist Ideological and Educational Research. In this role, Rosenberg organized and directed an initiative, the *Einsatzstab Rosenberg*, which was responsible for the plunder of museums, libraries, and private homes. Between 1940 and 1944 the *Einsatzstab* confiscated over 21,903 art objects and pillaged 69,619 Jewish homes. In 1941 he was appointed Reich Minister for Occupied Eastern Territories during which time he devised policies of Germanisation; giving orders to segregate Jewish populations and for mass deportations of labourers from the Eastern Territories, specifically the “Heu Aktion” in which 40,000 to 50,000 youths were sent to the Reich in 1944. As in the case of Jodl, Rosenberg was found guilty on all counts of his indictment and was sentenced to death for war crimes and crimes against humanity.

During the Nuremberg Trial, the prosecutors and judges addressed and repeatedly condemned the practice of "Germanizing" or "Nazifying" occupied or "annexed" territories by deporting or expelling the original population and moving in German settlers. In this respect, the Nuremberg Trial set the precedent for codification in the Fourth Geneva Convention, article 49, that population transfers and colonization in occupied territory constitute both a war crime and a crime against humanity, and that deportation of persons is illegal. Moreover, Nuremberg established the protected status of both public and private property during wartime, prosecuting its destruction, confiscation and plunder as crimes.

The International Military Tribunal for the Far East (Tokyo Tribunal)

As with Nuremberg, the Tokyo Tribunal was established to prosecute principal perpetrators of crimes against peace, war crimes and crimes against humanity committed during the Second World War. In relation to ESCR, the indictment accused the defendants of plundering public and

private property, wantonly destroying cities, towns and villages beyond any justification of military necessity. The 1937 Rape of Nanking emerges as the most prominent example of the prosecution of violations of ESCR, as military commanders and personnel were found guilty of unlimited looting and burning of residential and commercial properties and the ultimate destruction of one third of the city.⁵ Significantly, then Foreign Minister Koki Hirota was the only civilian sentenced to death as the Tribunal established that he had received reports and had knowledge of the atrocities being committed at Nanking. Hirota was found guilty of being “derelict in his duty” as he did not compel the Japanese Cabinet to put an end to the atrocities. This finding that inaction—as distinct from active involvement—on the part of State authorities in not preventing the commission of international crimes is sufficient to establish criminal accountability set an important precedent which informed the duties of states in international human rights law and notions of accountability in IHL.

However, victims were not heard at Nuremberg. Nor was their remedy and reparation a subject of the trials. From the perspective of victims, the trials might as well have been taking place in another world—many felt that they were not intended as remedy for them, but rather for the allied powers. Not only was retribution not necessarily delivered to victims, but the return of what was lost to individuals and communities, material and nonmaterial, was not within the scope of the Tribunal.

According to Frederick Terna, a survivor of various concentration camps, including Auschwitz, Attempts to recover property or possessions were rebuffed at every turn... Generally, I was aware that the trials were going on, who the accused were, and I followed it as closely as the newspapers allowed me, but I do not remember the details... We [survivors] were far removed from the action... The Nuremberg trials were seen as a necessary action. War crimes needed to be defined and punished, but the trials did not have an impact on us as survivors... Justice was a far-away concept. It certainly was not available on a personal or local level. The Nuremberg trials were a distant happening, important for the abstract concept of international law, but did not touch us personally then.

Another survivor, Yisrael Gutman, felt that the allies

...only used evidence that was collected to accuse the perpetrators and avoided the full scope of what happened to humanity and human society in general and the Jewish dimension in particular. Thus they did not expose the main issue of this war... [that it] took place against the civilian population. No one sought us as a community that had anything to do with the trial. No one tried to approach us and say: Do you have anyone who will be there? Do you have witnesses? They did not seek any of it. If I had showed up there [the trial] they would not have let me in.

In September 1945, Chaim Weizmann issued a memorandum as representative of the World Zionist Organization/Jewish Agency for [the Land of] Israel to the governments of the United States, the Soviet Union, Britain and France "demanding" "reparations, restitution and indemnification due to the Jewish people from Germany." The eventual reparations to victims

⁵ International Military Tribunal for the Far East. “Conventional War Crimes: The Rape of Nanking” (Chapter VIII), *Judgment: International Military Tribunal for the Far East*, at: <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-8.html>, 1011–18.

followed a separate process of negotiations and legal battles apart from the International Military Tribunals. In the case of Jewish victims of Nazi crimes, the bulk of reparations, both cash payments and reparations in kind, were carried out through intermediaries.

The Luxembourg Agreement, signed by Israeli Foreign Minister Moshe Sherrett and German Chancellor Konrad Adenauer in 1952, concluded a major portion of arrangements for reparations paid from the State of the Federal Republic of Germany (FRG) not to Jewish victims, but to the State of Israel on behalf of the persons of Jewish faith victimized as slave labor during the Second World War period.⁶ Nahum Goldmann, the negotiator and a cosigner of the Agreement, was president of the World Jewish Congress, and later president of the World Zionist Organization. The World Zionist Organization/Jewish Agency (WZO/JA), an agency of the State of Israel, became the vehicle for cash and in-kind compensations.⁷

Under the Luxembourg Agreement, the FRG undertook to pay an amount of DM3,450,000,000 (\$845,000,000) in goods, of which DM450,000,000 (\$110,000,000) was earmarked for allocation by the Conference on Jewish Material Claims against Germany, Inc. ("Claims Conference" of major Jewish organizations). That amount was to be paid in annual installments over a period of 14 years (between 1 April 1953, and 31 March 1966). Thirty percent was to pay for Israel's crude oil purchases in the United Kingdom. With the balance of 70%, Israel was to buy ferrous and nonferrous metals, steel, chemical, industrial, and agricultural products. The reparations agreement was implemented in Israel through the government-owned Shilumim Corporation in Tel Aviv, which accepted orders from prospective buyers under the agreement, and by the Israel Purchasing Mission in Cologne, to place these orders with the German suppliers. Goods bought and imported under the agreement represented 12–14% of Israel's annual imports and thus made an important contribution to Israel's economy and infrastructure in the colonization of Palestine.⁸

The implementation of the reparations agreement also made the two states close trade partners. West Germany became one of Israel's foremost importers, while 25% of Israel's shipbuilding came from West Germany, 9% of Israel's electrical industry, eleven percent of the iron and steel and 13% of machinery.⁹ Shipments under the agreement comprised 12% of all annual Israel imports. They helped fuel Israel's economy and stimulate future production. In the north, Israel's ironworks were built entirely from German shipments. About 2,000 individual large and small Israeli enterprises received machinery and other equipment,¹⁰ and the reparations agreement contributed significantly to the development of Israel's telecommunication services and industry.¹¹

The Claims Conference has come under severe criticism for improprieties, including a failure to ensure that the reparations have not ended up in the hands of those who need and deserve them

⁶ P.G., "German Reparations to Israel: The 1952 Treaty and Its Effects," *The World Today*, Vol. 10, No. 6 (June 1954), pp. 258–74.

⁷ Ronald W. Zweig, *German reparations and the Jewish world: a history of the claims conference* (Bolder CO: Westview Press, 1987), 71.

⁸ "Reparations, German," at http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0017_0_16646.html.

⁹ Rolf Vogel, ed., *The German Path to Israel* (London: Oswald Wolff, 1969), 89.

¹⁰ *Ibid.*, 88.

¹¹ Nicholas Balabkins, *West Germany Reparations to Israel* (New Brunswick, New Jersey: Rutgers University Press, 1971), 97 found in M. Sicron, *Immigration to Israel, 1948-1953* (Jerusalem: Central Bureau of Statistics, 1957), 246.

most is a legitimate concern.¹² Other concerns arise from the claim of the State of Israel and WZO/JA to represent and act on behalf of all people of Jewish faith, including those victims and survivors of the Nazi regime.¹³ Some consider the contradiction that those same institutions maintain the racial classification of people of Jewish faith that lay at the ideological base of the Nazi discrimination and eventual atrocities.¹⁴ An obvious shortcoming of the post-World War II reparations has been the omission of comparable processes for non-Jewish victims, in particular, Sinti and Roma people, whose “devouring” by the Nazi regime compares in both severity of victimization and proportion of population lost in the death camps.

Ad Hoc and Special Tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established by the UN Security Council in early 1993 and 1994 in the wake of mass atrocities committed in the Balkans and in Rwanda. These are arguably the first truly international criminal tribunals. While the Nuremberg and Tokyo tribunals were set up by the Allies to prosecute the Germans and Japanese responsible for atrocities committed during World War II, the ICTY and ICTR were formulated at the behest of the international community and their rules and procedures have been shaped by international legal scholars. Building on the procedural developments in international criminal law arising from the Nuremberg Trial and the Tokyo Tribunal, both the ICTY and ICTR have directly influenced the procedural law and laws of evidence of the ICC and have been fundamental in setting legal precedents for the interpretation of crimes against humanity, war crimes and the crime of genocide in international criminal law. These precedents can be applied in domestic jurisdiction, regional courts, as well as the ICC.

To date, the Tribunal has concluded proceedings against 121 alleged perpetrators out of 161 indictments. At present, one case is in pretrial, 24 are in trial stage, 14 are in the appeals phase, and two accused are still at large. The Tribunal is expected to wrap up its proceedings, including appeals, sometime in 2011.¹⁵

A prominent case involving serious violations of ESCR is that of Mladen Naletilic and Vinko Martinovic, a.k.a. “Tuta” and “Stela,” respectively, who were each indicted for grave breaches of the Geneva Conventions, violations of the laws and customs of war and crimes against humanity including: unlawful transfer of a civilian; wanton destruction not justified by military necessity; plunder of public or private property and persecutions on political, racial and religious grounds. Their trial commenced on 10 September 2001 and was concluded on 31 October 2002.¹⁶

¹² Isi Leibler, “Now, the ‘March of the Living’ scandal,” Jerusalem Post (8 May 2007), at:

<http://fr.jpost.com/servlet/Satellite?cid=1178431600267&pagename=JPost%2FJPostArticle%2FPrinter>;

“Where did the Shoah money go?” *Ynetnews* (10 December 2006), at: <http://www.ynetnews.com/articles/1.7340.L-3338282.00.html>; “Germany mulls probe of Jewish group overseeing Holocaust restitution,” *Haaretz* (17 June 2008), at: <http://www.haaretz.com/hasen/spages/993266.html>.

¹³ Norman Finkelstein, *The Holocaust Industry: Reflections on the Exploitation of Jewish Suffering* (New York: Verso, 2nd ed. 2003).

¹⁴ W. Thomas Mallison, “The Zionist-Israel Juridical Claims to Constitute ‘The Jewish People’ Nationality Entity and to Confer Membership upon It: Appraisal in Public International Law,” *George Washington University Law Review* 32 (1964).

¹⁵ <http://www.icty.org/>

¹⁶ Adapted from ‘IT-98-34’ Case Information Sheet, available at: <http://www.icty.org/>

Naletilic, hereafter Tuta, was the founder and commander of the Bosnian Croat "Kaznjenicka Bojna" (Convicts Battalion), consisting of 200-300 soldiers based around Mostar, in southeastern Bosnia and Herzegovina. Martinovic, hereafter Stela, was the commander of the "Mrmak" unit of the Convicts Battalion and was the subordinate of Tuta. Their trial covered the conflict between Bosnian Croats and Bosnian Muslims for the period beginning April 1993 to January 1994. These two ethnic groups previously had fought in cooperation on the same side in 1992 under the Croatian Defense Council (HVO) against the Serb-Montenegrin forces, sometimes referred to as the Yugoslav People's Army (JNA).

The Trial Chamber determined that there was a widespread and systematic attack against the Muslim civilian population in the town of Mostar, as well as the towns of Solvici and Doljani at the time of Tuta and Stela's indictment. Bosnian Muslim homes in the area were burnt and mosques were systematically destroyed to prevent Muslims from returning. Mostar was attacked in May 1993 and following the hostilities groups of soldiers forcibly evicted Bosnian Muslim families out of their apartments at night and forced these families to leave all their possessions behind and move to the Eastern part of the town, which subsequently became overpopulated with forcibly displaced civilians. Water and electricity services were cut off, humanitarian organisations were denied access for weeks and other crucial public services, such as hospitals, were inaccessible because they were situated in the Western part of Mostar.

The Chamber concluded that Tuta and Stela intended to discriminate against the Muslim population. Tuta was responsible for the forced eviction and removal of approximately 400 Muslim civilians from Solvici and Doljani on 4 May. Through an operation he planned and conducted with a contingent of the Battalion known as Tuta's Men, civilians were detained and held in houses in another hamlet before they were transferred. On 9 May 1993, Stela was responsible for and was personally involved in rounding up the Muslim civilian population of Mostar and unlawfully transferring and detaining them at the Heliodrom. Women, children and the elderly were intimidated and forced out of their homes at gunpoint. Thereafter, the attackers looted many of the apartments.

Both Tuta and Stela were convicted for the looting of private property of Bosnian Muslims in Mostar, committed by troops under their command. Finally, the Chamber convicted Tuta for ordering the destruction of all Bosnian Muslim homes in Doljani on 23 April 1993.¹⁷ They were sentenced to 20 years and 18 years imprisonment respectively.

In addition to the case of Tuta and Stela, no less than 12 other perpetrators were prosecuted and convicted for violations of ESCR constituting war crimes and crimes against humanity, primarily, these violations were the destruction and plunder of property, destruction of institutions dedicated to religion or education and forcible transfer and deportation as both persecution and other inhumane acts. The ICTY then continued and continues, in the vein of Nuremberg and Tokyo, successfully to enforce IHL and prosecute violations of ESCR contained therein.

¹⁷ Ibid.

While the ICTY Statute's provisions for witness protection made victim participation theoretically possible, in practice, victims were not allowed to participate in their personal capacity within the criminal proceedings, nor were they entitled to receive reparations or compensation for damages suffered from the atrocities perpetrated against them. In effect, the Statute failed to address participation and reparation adequately, as its rules and procedures of evidence provided only limited guidance on these issues.¹⁸

In the *Kupreškić* case, the ICTY Trial Chamber recognized that the comprehensive destruction of homes and property may constitute the crime against humanity of persecution when committed with the requisite intent.¹⁹ Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies, is also recognized as an international crime.²⁰

These precedents serve transitional justice practitioners to use the statutes of existing international and national courts to adjudicate economic, social, and cultural rights violations as international crimes.

Special Panel for Serious Crimes at the Dili District Court

UNSC resolution 1272 (1999) has established the UN Transitional Administration for East Timor (UNTAET) and its internal component for the investigation and prosecution of Indonesian war criminals, the Serious Crimes Investigation Unit (SCIU).²¹ For the adjudication of genocide, war crimes and crimes against humanity (collectively referred to as "serious criminal offences"), the SCIU included other inhumane acts or persecutions such as destruction of property, forced eviction and forcible transfer of persons committed under Indonesian rule in East Timor.

On the basis of preliminary findings of the SCIU, UNTAET established a judicial system in East Timor along with a system of district courts. A hybrid tribunal known as the Special Panel for Serious Crimes (Special Panel) was then established in the Dili District Court to preside over serious criminal offences. Special Panel prosecutions addressed the criminal activities of Indonesian military units and militias in East Timor within two specific periods: (1) from 27 January 1999, following the Government of Indonesia's announcement that the people of East Timor "would be allowed to choose between autonomy with the Republic of Indonesia or independence," to 4 September 1999, when 78.5% of voters in a UN-sponsored referendum voted in favour of independence; and (2) post referendum through 25 October 1999.

¹⁸ Bassiouni, Cherif. M., *Introduction to International Criminal Law* (New York: Transnational Publishers, 2003).

¹⁹ Prosecutor v. *Kupreškić* Case No. IT-95-16-T, Trial Judgment, 628–31 (14 January 2000).

²⁰ Protocols Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 54, para. 1, June 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court, art. 8, para. 2(b)(xxv), U.N. Doc. A/CONF. 183/9 (July 17, 1998). See also arts. 6(c), 8(2)(b)(ix), 8(2)(b)(xvi).

²¹ UN Security Council Resolution 1272, 25 October 1999, S/RES/1272 (1999). In addition, a UN International Commission of Inquiry, tasked with the investigation of Indonesia's criminal activity in East Timor, concluded in January 2000 that it was necessary to establish an Ad Hoc Tribunal in Indonesia explicitly for the prosecution of Indonesian suspects, which the country refused to extradite for trial in the Special Panel. To date, the Indonesia Ad Hoc Tribunal in Jakarta has tried and acquitted 10 military and police officers for charges of crimes against humanity. The Indonesian Tribunal is thus widely discredited in light of its acquittals, its failure to seek maximum penalty in prosecutions and its appointment of judges with close ties to the Indonesian military.

Intended as a mechanism of transitional justice, the Special Panel, comprised of both East Timorese and international judges, was envisioned as part of the national reconstruction project for East Timor following its formal independence from Indonesia on 20 May 2002, made possible by an UN-issued referendum for independence in 1999. In its six years of operation, from 2000 to 2006, the Special Panel tried 55 cases, resulting in 84 individual convictions for crimes against humanity and three acquittals.²²

While the majority of ESCR violations in the case of East Timor were taken up under the nonjudicial rubric of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR), established in 2001 under the auspices of UNTAET, of the 55 cases tried in the Special Panel, 20 included violations related to the human right to adequate housing. These cases prosecuted widespread and systemic forced deportation, forced transfer of population and destruction of property as crimes against humanity. Each of these cases resulted in convictions, which reaffirms the gravity and judiciability of violations of the right to adequate housing as war crimes and crimes against humanity.

The first major crimes against humanity case successfully prosecuted by the Special Panel, Joni Marques et al. (Case No. 09/2000), included among its charges forced deportation and destruction of property.²³ These crimes took place in the context of a widespread and systematic attack directed against the civilian population in East Timor in 1999 and were part of an orchestrated campaign of violence that included incitement, intimidation and threats to life carried out by proautonomy militia, members of the Indonesian armed forces: Tentara Nasional Indonesia (TNI) and the Indonesian police force (POLRI) with the acquiescence and active participation of civilian and military authorities.²⁴

These large-scale attacks were indiscriminately directed against civilians of all age groups and caused the internal displacement of thousands of persons. Systematic violence was also directed against property and livestock. The forcible transfer and deportation of the civilian population within East Timor and to West Timor was an essential feature of this violence.²⁵

From 8 September 1999, Joni Marques et al. participated in a systematic campaign of violence in Lautem District with the cooperation of Indonesian military units. This campaign involved tactics of intimidation, widespread arson, plunder and looting of homes and property, deportation or forcible transfer of civilians through widespread abductions of villagers from Leuro and other villages to Military Barracks in Indonesian occupied territories, attacks on property and livestock, and other systematic acts of violence that caused the internal displacement of thousands of persons.

²² Established pursuant to UN General Assembly, *Report of the International Commission of Inquiry on East Timor*, 31 January 2000, A/54/726,S/2000/59

²³ UNTAET, Case No. (09/2000): The General Prosecutor of the United Nations Transitional Administration in East Timor against Joni Marques, Manuel da Costa, Joao da Costa a.k.a Lemorai, Paulo da Costa, Amelio da Costa, Hilario da Silva, Gonsalo dos Santos, Alarico Fernandes, Mautersa Monis, Gilberto Fernandes, Syaful Anwar, Amended Indictment, at: <http://socrates.berkeley.edu/~warcrime/ET-Docs/MP-SCU%20Indictments/2000/09-2000%20Joni%20Marques%20et%20al%20Indictment.pdf>

²⁴ Ibid. *Introductory Statement of Facts*.

²⁵ Ibid.

On or around 8 September 1999, Joni Marques, Alarico Fernandes and other members of what was known as “Team Alfa” went to Leuro armed with rifles, machetes, swords and a container of kerosene. Together with the village chief they began to threaten the villagers of Leuro in order to make them leave East Timor. The villagers were told that they had two days to pack their possessions and place them outside their homes for the transfer. Joni Marques, Alarico Fernandes and others threatened to kill all the villagers if they did not leave. They burned down houses and shot at livestock.

The villagers were then transported by the accused to the base of the TNI 745 Battalion and from there to Com and West Timor. Following this, the accused returned to this and other villages to burn numerous homes and kill livestock and birds. Of the nine defendants in this case, four were convicted of the crimes against humanity of forcible transfer of civilian population, deportation and persecution; two were sentenced to 33 years and four months imprisonment, one was sentenced to 23 years imprisonment and one was sentenced to four years imprisonment.²⁶

Both the composition and design of the Special Panel, while considerably less costly than its international predecessors the ICTY and ICTR, were intended to establish a kind of local ownership that was absent in the ad hoc tribunals, however, the Special Panel court established by the UNTAET did not enjoy a mandate to order reparations. East Timor’s wide-scale and lengthy crisis in fact resulted in a dual system of judicial and non-judicial mechanisms tasked separately with the determination of responsibility for crimes and human rights violations and the delivery of restorative remedy. All convictions for crimes against humanity relating to deportation or forced transfer and destruction of property, thus offered only the retributive aspect of remedy.

The Special Court in Sierra Leone

Another hybrid tribunal, the mandate of the Special Court of Sierra Leone (SCSL) is to try those bearing the greatest responsibility for atrocities committed in Sierra Leone since 30 November 1996.²⁷ The SCSL was established in 2002 by an agreement between the government of Sierra Leone and the United Nations Security Council following a request from Sierra Leonean President Ahmad Tejan Kabbah.

Like the Special Panels, the SCLS is comprised of both international and Sierra Leonean judges and applies both international and domestic laws. The court operates outside of the Sierra Leonean domestic legal system, and its Statute draws from IHL as well as a limited amount of domestic criminal law. In particular, the Statute permits the prosecution of crimes against humanity, violations of common Article 3 (Geneva Conventions) and other serious violations of international humanitarian law.²⁸

In 2003, indictments were issued for thirteen individuals who were allegedly associated with three factions of the conflict: the Revolutionary United Front (RUF), an armed rebel group that invaded Sierra Leone from Liberia in 1991, the Armed Forces Revolutionary Council (AFRC),

²⁶ Ibid, *Judgment*.

²⁷ Statute of the Special Court of Sierra Leone at: <http://www.specialcourt.org/documents/SpecialCourtStatuteFinal.pdf>

²⁸ Ibid.

which overthrew the Kabbah government in a 1997 coup, and the Civil Defence Forces (CDF), a pro-government militia drawn from traditional societies to fight against the RUF and AFRC rebels. Of the thirteen individuals, the indictments of two of the highest level RUF commanders were withdrawn in April 2005 due to their death. The whereabouts of alleged AFRC leader Johnny Paul Koroma is unknown; he was declared dead in Liberia in June 2003, however, the indictment against him remains in force.²⁹

The SCSL trial of Charles Taylor, the former president of Liberia, is currently taking place in The Hague at the ICC, however, the trial is expected to move to the courtroom of the Special Tribunal for Lebanon.³⁰ This is a particularly high-profile case as he is a former head of state and as such, subject to charges of command responsibility. In the case of East Timor, affected communities have criticized that only low-level perpetrators were prosecuted.³¹ The successful prosecution of a figure like Taylor could then lend greater legitimacy to the hybrid court in the eyes of the victims it is meant to serve.

Concerning violations of ESCR, Taylor, a.k.a. Dankpannah, is being charged with “Acts of Terrorism” (Count 1) and “Pillage” (Count 11), both violations of Common Article 3 and Additional Protocol II. Taylor was convicted for his “direction and/or control of” acts committed by members of the following militias: the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta, and Liberian fighters. Specifically, Taylor is being held accountable for Acts of Terrorism including the widespread burning of civilian property by all militias mentioned above in the the Kono District, Freetown and Western Area, as well as widespread looting of civilian property in Kono District, Bombali District, Port Loko District, Freetown and Western Area.³² To date, the testimony for the prosecution has been concluded and defense proceedings have begun.³³

Out of all indictments, the SCSL has delivered nine convictions, six of which include convictions for violations of rights to property and housing (looting and burning); three former members of the AFRC each sentenced to 40 years in prison, and three former members of the RUF whose sentences have yet to be delivered.

Victims have participated in the SCSL trials as witnesses, and, as with the ICTY, the SCSL Statute has special provisions for their protection. It established a special victims and witnesses protection unit as the conduct of the trials in the country made the concealment of witness identities a much greater challenge. It also has a psychosocial support unit to help victims and their families to cope with trauma.³⁴

In general, access to the justice process has been wider in the SCSL than in the case of East Timor. In addition to the support of witnesses and their families, the Court has implemented an outreach programme to engage Sierra Leonean civil society through community and town hall

²⁹ Available on at the website of the Special Court: <http://www.sc-sl.org>

³⁰ SCSL, “Taylor Trial to move to STL Courtroom,” Press Release, 13 May 2010. <http://www.sc-sl.org>

³¹ Rieger and Wierde, 2006.

³² *Interim Report for the Special Court for Sierra Leone*, War Crimes Studies Center, University of California, Berkeley, April 2005.

³³ The Special Court for Sierra Leone, at: <http://www.sc-sl.org/>

³⁴ Ibid.

meetings about the promotion and protection of human rights and the rule of law.³⁵ Other tools such as media and professional training have also been employed. However, as with all other judicial mechanisms thus far, the SCSL is responsible only for prosecution and reparations are not within its scope. Autonomous from the Court, other transitional justice mechanisms were established to address some of the elements of reparations outlined in the Basic Principles.

International Criminal Court

As the ICTY and ICTR were underway, the wheels were also set in motion to build a permanent international criminal court. On 17 July 1998, 120 states adopted the Rome Statute of the International Criminal Court. According to the Statute, the Court holds jurisdiction over the most serious crimes under international law: Genocide (Art. 6), Crimes against Humanity (Art. 7), War Crimes (Art. 8), as well as the crime of Aggression.³⁶ In relation to ESCR, the ICC adjudicates the crimes against humanity of deportation or forcible transfer, persecution, and other inhumane acts,³⁷ as well as the war crimes of inhuman treatment, destruction and appropriation of property, unlawful deportation and transfer, and the settlement, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.³⁸

International human rights treaty obligations, in addition to IHL, then form a basis for prosecuting violations of ESCR in the ICC system including: arbitrary damage, destruction and forcible acquisition of civilian private and public property, including homes and other shelters, infrastructure and public service facilities, and all manner of natural resources, deportation or forcible population transfer and forced eviction.³⁹

While the ICC focuses on individual criminal responsibility⁴⁰ for these grave breaches, its Statute asserts that none of its provisions shall affect the responsibility of States under international law. While States *per se* are not eligible for prosecution, as in the International Court of Justice, the principles of State responsibility and international cooperation articulated in international law are affirmed in Articles 75 and 79 of the Statute pertaining to reparations. Such is critical for the realization of remedy and reparations for victims of violations of ESCR.

Reparations in the ICC

³⁵ Ibid.

³⁶ While the UN General Assembly and its Special Committee on the Question of Defining Aggression arrived at a legal definition of the term, adopting Resolution 3314 on the matter by consensus in 1974, the Security Council has not yet adopted the legal definition of the crime of aggression. The Rome Statute then only provides for the Court's jurisdiction over acts constituting aggression in practice, the conditions of which must be determined by the Security Council.

³⁷ Article 7 (1) (d), Article 7 (1) (h),

³⁸ Article 8 (2) (a) (ii), Article 8 (2) (a) (iv), Article 8 (2) (a) (vii), Article 8 (2) (b) (viii).

³⁹ list sources of law as footnote or annex

⁴⁰ The Statute's provisions accommodate a range of modes of liability that allow for the identification and prosecution of individuals committing, ordering, aiding and abetting, or orchestrating crimes in concert, whether under the rubric of an organization or at the behest of a State. Substantive developments concerning modes of liability have elaborated on the elements of complicity, command or superior responsibility, and the principle of joint criminal enterprise (JCE). JCE, which facilitates the prosecution of individuals acting in concert was applied and developed through ICTY proceedings and has since been challenged. JCE and other modes of participation will be addressed in Section III with respect to the identification of perpetrators.

Having established the recognition of ESCR and violations of its fundamental elements as crimes in international human rights, humanitarian and criminal law, we will now move on to a discussion of the reparations framework in international law.

When domestic courts are unable or unwilling to deliver remedy to victims, the ICC becomes the appropriate venue for victims to seek retributive and restorative remedy for the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. As with international and internationalized tribunals, the Court has jurisdiction over individual perpetrators and not States per se.

Attention to victims' right to remedy and repair through prosecution and reparations was a critical component of the negotiation and codification of the Rome Statute of the ICC and in the subsequent drafting of its Rules of Procedure and Evidence (RPE) by the ICC Preparatory Commission. Article 75 of the Rome Statute grants the ICC jurisdiction in ordering restitution, compensation and rehabilitation reparations "of or in respect of" victims or the victims' Trust Fund (VTF), which is regulated by Rule 98(2) of the RPE. The VTF is an important component of the Court in that it enables the provision of reparations independent of prosecution and regardless of perpetrator's capacity to offer repair. It serves to deliver a form of reparation (i.e., cash payments) based on the recognition of the victimization, apart from and parallel to judge-ordered reparations at the time of conviction.

The ICC is the only judicial forum governed by a set of procedural rules that authorize the Court with the power to adjudicate both criminal responsibility and repair for victims. According to Rule 97(1) of the ICC's RPE, the Court will order compensation for victims after taking into consideration "the scope and extent of any damage, loss and injury." The Statute, however, does not limit itself to the provision of compensation; it does account for and aims to provide to the extent possible the full package of reparations established by the Basic Principles.

Rule 85 of the ICC RPE has broadly defined victims to include "natural [*not* legal] persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." Victims, as a category, may also include "organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes." Formal and informal enterprises are not considered "victims" within the purview of the Court.

The drafters of the ICC Statute and RPE have settled on a formula by which victims' participation in judicial proceedings actualizes victims' effective right to remedy. In the case of multiple victims, collective counsel can be selected either by the victims or, if necessary, by the Court.

Regional Mechanisms

As a product of increasing regionalization, human rights treaties have been crafted at the regional level on the basis of States' international human rights obligations, in addition to regional agreements covering political and economic cooperation. Regional courts such as the IACHR),

the European Court of Human Rights (ECtHR) and the African Court on Human and Peoples' Rights (ACHPR) have all been established to deal with human rights violations occurring in their jurisdictions and to enforce regional treaty obligations. These Courts can be effective venues for the prosecution of violations of ESCR occurring within their territories.

Awas Tingni

The case of *Awas Tingni v. Nicaragua* brought before the IACHR is one such example. The government of Nicaragua intended to grant a 30-year logging concession to a Korean company on the traditional lands of the Awas Tingni community without consulting them or seeking their consent.⁴¹ Employing the complaints mechanism under the American Convention on Human Rights, lawyers for the Awas Tingni filed a petition with the IACHR's investigatory body against the Republic of Nicaragua, arguing that the State was in violation of Articles 1, 2, 21 and 25 of the Convention. Respectively, these articles provide that states must respect the rights contained in the convention without discrimination; that states must take legislative or other measures to ensure these rights; that everyone has the right to enjoyment of their property, which can only be compromised on the grounds of public necessity and with the provision of appropriate compensation; and finally that everyone has the right to judicial protection. The Awas Tingni held that Nicaragua failed to recognise their customary tenure over the land by both referring to it as "national land" and by granting the concession without seeking their consent.⁴²

The IACtHR ruled in favour of the Awas Tingni community, finding that the international right to property, recognised by the American Convention on Human Rights, includes the right to the protection of customary land and resource tenure for Indigenous people. The Court found by seven votes to one that Nicaragua had violated Article 25, 1(1) and 2 and Article 21 of the Convention, the right to property. The Court was unanimous in its verdict that Nicaragua must adopt measures to create a mechanism to ensure the recognition of traditional Indigenous community land in accordance with the customary law, values, usage and customs.⁴³

The Court also ruled that the judgment represented in part, a form of reparation for the members of the Awas Tingni community. The judgment called for the investment by the Republic of Nicaragua of US\$50,000 in public works and services as further reparation for moral damages and ordered the payment by Nicaragua of US\$30,000 for expenses and legal costs incurred by the Awas Tingni in both the domestic and international proceedings.⁴⁴

The Inter-American Court of Human Rights has issued well-known orders for reparation awards for victims of human rights violations committed during a conflict; for example, in the Plan de Sánchez case, reparations included obligations for the state of Guatemala to implement health, education, and infrastructure programs for the affected communities.⁴⁵ However, it is vital to ensure that, in implementing reparations, certain victims are not overlooked and/or that the state does not continue to practice discrimination.

⁴¹ Davis, Megan, "The Awas Tingni Decision: Case of the Mayanga (Sumo) Awas Tingni Community v. the Republic of Nicaragua," 2002, *Indigenous Bulletin* 43.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Plan de Sánchez Massacre v. Guatemala Case*, 2004 Inter-American Court of Human Rights (IACtHR), (Ser. C) No. 116 (19 November 2004), at 101.

Plan de Sánchez Massacre

Emblematic among the international jurisprudence is the Inter-American Court of Justice decision in *Massacre of Plan Sánchez v. Guatemala*, recognizing ESCR violations as elements of the abuses and of the remedies to crimes committed in the 1982 Guatemalan military-led killing of 268 indigenous persons, as well as torture, rape and displacement. The Court awarded reparations measures to rectify the vulnerability of the surviving victims and took into consideration the fact that the massacre as having “gravely affected the identity and values of the members of the Maya-Achi people.”

The Court also recognized that the crimes gravely affected the surviving community’s livelihood and awarded US\$5,000 in material damages for each victim. In part due to the damage to the community’s culture, the Court awarded nonpecuniary damages of US\$20,000 to each victim. Consistent with the “holistic” concept of reparations, the Court also ruled that the Government of Guatemala carry out a public bilingual acknowledgment of the harm done to the Maya-Achi.⁴⁶ In conjunction with a promise of nonrepetition of the crimes, the Court ordered the state to pay an additional \$25,000 to the chapel that stands in commemoration of the massacre victims.⁴⁷ In addition, the Court ordered the state to provide specialized mental and physical health care to victims as forms of rehabilitation.⁴⁸

In addressing the gross violation of forced eviction and displacement, the Court referred to the community’s human right to adequate housing, consistent with the CESCR General Comment No. 4, ordering the state to implement a housing program for surviving victims.⁴⁹ The related development program included a sanitation system and potable water, also corresponding to the determinants of health,⁵⁰ a health center and a bilingual primary and secondary school.⁵¹

Administrative Forms of Reparations

Compensation Programs in the Former Yugoslavia

The delivery of reparations in the context of the Former Yugoslavia has taken place independently of criminal prosecution in the ICTY and independently of any truth and reconciliation procedure. These reparations have taken several forms, including material reparations (financial, housing assistance, property restitution, etc.), restitution of rights, public apologies and the building of memorials. These administrative reparations are particularly useful to review as they have been provided specifically for violations of ESCR.

At the national level, material reparations for victims’ personal losses include monetary compensation and social benefits. All governments have passed legislation to compensate war veterans and their families; however, the amount of compensation and eligibility varies from one

⁴⁶ *Plan de Sánchez Massacre v. Guatemala Case*, op. cit., para. 100.

⁴⁷ *Ibid.*, para. 104.

⁴⁸ *Ibid.*, para. 107.

⁴⁹ *Ibid.*, para. 105.

⁵⁰ Corresponding to CESCR General Comment No. 14 “the right to the highest attainable standard of health,” (2000), para. 4.

⁵¹ Corresponding to CESCR General Comment No. 13 “the right to education” (1999), para. 50.

state to another. It is critical to note that recipients of reparations were those on the side of the government during the war and are members of the dominant ethnic group. There are no effective programs to compensate civilian victims of the conflict.⁵² Throughout the former Yugoslavia, authorities have paid reparations primarily to members of the dominant ethnic group in the area and rarely to other victims.⁵³

Reparations for Property Loss

The destruction and burning of villages, mosques and other buildings was a central feature of the conflict, as was the forced displacement of the civilian population. Those who lost their homes are entitled to receive some sort of assistance from the state, either through temporary housing, loans or other financial subsidies for rebuilding.⁵⁴ However, victims do not receive full restitution.

In BiH, an internationally established body, the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) was established to facilitate the restitution of property that was not destroyed but was appropriated and re-occupied. Established under the Dayton Peace Agreements, the CRPC determines the claims of hundreds of thousands of people who lost property during the war.⁵⁵ As of 2002, the CRPC had issued a total of 229,209 property decisions, which local authorities are responsible to implement. This implementation has been successfully carried out as local authorities have resolved about 95 percent of the claims received.⁵⁶

The government of Croatia established Housing Commissions to implement a similar return of appropriated property; however, implementation has been challenged by a lack of political will, a lack of resources and a lack of coordination from the government. Insufficient alternative accommodation, a lack of a clear definition of illegal occupancy and an absence of appropriate legislation to clarify complications concerning cross-border occupancy have provided substantial challenges to the fulfillment of restitution in this case. Ethnic Serbian civilians displaced from Croatia have been systematically denied return, resettlement, housing and earned pensions.⁵⁷

In Kosovo, joint local and international bodies, the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) have exclusive jurisdiction to settle serious residential property claims until the national courts are prepared to deal with them. The HPD's mandate includes handling claims of property lost through discrimination; claims for registration of informal property transactions; and claims by refugees and internally displaced

⁵² Djordje Djordjevic, *A Casualty of Politics: Overview of Acts and Projects of Reparation on the Territory of the Former Yugoslavia* (New York: International Center for Transitional Justice, July 2002).

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ General Framework Agreement for Peace in Bosnia and Herzegovina [GFAP], Bosn.-Herz.-Croat.-Yugo., annex 6, Dec. 14, 1995, 35 I.L.M. 89, at: http://www.ohr.int/dpa/default.asp?content_id=380; Walpurga Englbrecht, *Property Rights in Bosnia and Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber towards their Protection*, in Scott Leckie, ed., *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* 83, 83–142 (2003).

⁵⁶ <http://www.ictj.org/en/where/region4/510.html>

⁵⁷ Djordjevic, 2002.

persons who have lost possession of their homes but wish to return or transfer their property.⁵⁸ The HPD is also authorized to supervise the temporary allocation of property for humanitarian purposes. The HPCC has the exclusive power to resolve residential property disputes, issue eviction orders, and hand down final decisions.⁵⁹ It is local authorities, however, that are tasked with the implementation of these decisions.

In practice, restitution has been rife with problems. Weaknesses in Kosovo's judicial system and with police practices regarding property has led to illegal re-occupations following orders of eviction. Police and public prosecutors have been reluctant to pursue these illegal occupants despite the fact that they are authorized to do so.⁶⁰ Effective restitution is further complicated by the fact that IDPs who have been granted positive decisions face great difficulties in registering their properties in municipal cadastres, challenging both their occupation and/or resale of their property.⁶¹

United Nations' Compensation Commission

Iraq's occupation of Kuwait in August 1990 set another complex displacement in motion. Until coalition of states defeated the Iraqi occupation forces through the 42-day Second Gulf War, the city-state witnessed the displacement of over 300,000⁶² of Kuwaiti refugees, plus destructive and larcenous consequences for the city. Kuwait and the international community were left to extinguish the 1,160 oil well fires set by the retreating Iraqi army.

The war-displaced Kuwaitis returned home, and material victims won terms of compensation from Iraq through the United Nations Conciliation Commission. The UNCC Governing Council identified six categories of claims: four by individuals, one for corporations, and one for governments and international organizations, which also includes claims for environmental damage. The Category "A" claims were claims submitted by individuals who had to depart from Kuwait or Iraq between the date of Iraq's invasion of Kuwait on 2 August 1990 and the date of the cease-fire, 2 March 1991.⁶³ The Category "C" and Category "D" claims were individual claims, respectively for damages up to US\$100,000 and damages above US\$100,000 each, and claims could be made for different types of losses, including loss of real property, in both categories.⁶⁴ Close to 12,000 claims, out of approximately 16,500, were compensated by the

⁵⁸ Edward Tawil, *Property Rights in Kosovo: A Haunting Legacy of a Society in Transition*, New York: International Center for Transitional Justice, February 2009.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Between 300,000 and 400,000, according to the first installment report, p. 205.

⁶³ Compensation for successful claims in this category was set by the Governing Council at fixed sums. The Commission received approximately 920,000 category "A" claims submitted by seventy-seven Governments and thirteen offices of three international organizations, seeking a total of approximately US\$3.6 billion in compensation. The Panel of Commissioners completed its work in 1996. In total, the Governing Council has approved the payment of more than US\$3.2 billion in compensation for over 860,000 successful category "A" claimants.

⁶⁴ Category "C" claims could be made for twenty-one different types of losses, including those relating to departure from Kuwait or Iraq; personal injury; mental pain and anguish; loss of personal property; loss of bank accounts, stocks and other securities; loss of income; loss of real property; and individual business losses. The Commission received approximately 420,000 category "C" claims submitted by eighty-five governments and eight offices of three international organizations, seeking a total of approximately US\$9 billion in compensation. In addition, the Central Bank of the Government of Egypt submitted a consolidated category "C" claim on behalf of over 800,000 workers in Iraq for the nontransfer of remittances by Iraqi banks to beneficiaries in Egypt. This consolidated Egyptian category "C" claim comprised 1,240,000 individual claims with an asserted

Commission in the C7 claims category, for losses related to real property, including costs incurred for repairs and other losses, mainly for Kuwaiti nationals. In the Fourth Report of the Panel of Commissioners, 200 D7 claims were analyzed, the Panel recommending compensation totaling US\$57,659,045.08, against the total amount claimed of US\$73,437,225.43.

Only about 28% of Kuwait's pre-invasion population actually comprised Kuwaiti citizens. The largest percentage of noncitizens was an estimated 320,000 Palestinians and 270,000 Bidūn, stateless Arabs, though many between both groups actually had been born in Kuwait and/or lived there for decades.⁶⁵

“Egyptian workers” formed a special classification under category C claims (individual claims up to \$100,000 in value). While this class of claimants was theoretically eligible for indemnification for economic losses, the Iraqi government withheld the release of payments until agreement was reached with the postrevolution interim government of Egypt at end May 2011, 20 years after the assessed losses. The payments ultimately amounted to \$408 million in compensation for 637,000 claims to be processed through the Iraqi Rafidain Bank for transfer to the Central Bank of Egypt for distribution to claim holders.⁶⁶ The UNCC did not pursue a compensation scheme for other categories of workers, and conspicuously not for the Sudanese, Yemeni and Palestinian workers, whose political leadership did not participate in the 1991 war against Iraq,

Exercising distrust and vengeance during and after the Iraq occupation, Kuwait and Saudi Arabia expelled over 1.2 million resident workers, including 25,000 Sudanese, 400,000 Jordanians and 850,000 Yemenis, the most-affected group. That was part of the payment extracted for their countries’ nonsupport in the coalition war on Iraq itself. The GCC also cut aid and reduced trade to those three countries.⁶⁷

Slowly but steadily, the Yemeni returnees were absorbed into the population, except for some 80,000 with no village, kin or tribe to go back to. Those displaced people long remained in a few camps scattered around Hudaida in the Tihama region.⁶⁸

value of approximately US\$491 million. Category "C" claims were processed in seven installments. The Governing Council approved the payment of more than US\$4.9 billion to successful category "C" claimants.

The types of losses that could be claimed under category "D" were similar to those under category "C", with the most frequent being the loss of personal property; the loss of real property; the loss of income and business-related losses. The Commission received approximately 10,500 category "D" claims submitted by fifty governments and eight offices of three international organisations, seeking a total of approximately US\$10 billion in compensation. Source: <http://www.uncc.ch/theclaims.htm>.

⁶⁵ U.S. Committee for Refugees, *U.S. Committee for Refugees World Refugee Survey 1991*, p. 99. Michael Kramer, "Kuwait: Back To The Past," *Time* (5 August 1991), p. 35. Chris Hedges, "A Year Later, Kuwait Sinks into Malaise," *New York Times* (2 August 1991), pp. A1, A6. Jennifer Parmelee, "Iraqi Kurds in Kuwait Occupy State of Limbo," *The Washington Post* (4 January 1992), p. A14. John H. Cushman Jr., "1,200 Kuwaiti Refugees, Fearing Collaborator Charges, Flee to Iraq," *New York Times* (30 June 1991), at:

<http://query.nytimes.com/gst/fullpage.html?res=9D0CE6D6163CF933A05755C0A967958260>.

⁶⁶ "الشعب (20 آذار/مايو 2011): "الأمل يعود مجدداً لأصحاب "الحوالة الصفراء" لاستعادة أموالهم المجمدة لدى العراق منذ 20 عاماً"، <http://elshaab.org/thread.php?ID=1403>.

⁶⁷ Nazem Abdalla, "Impact of the Gulf Crisis on Developing Countries," report prepared for the UNDP's Gulf Task Force, June 1992.

⁶⁸ Abdulaziz al-Saqqaf, "Storm damage," *New Internationalist*, No. 236 (October 1992), at: <http://www.newint.org/issue236/storm.htm>.

Few Yemenis have been allowed back to work in Saudi Arabia, prolonging their losses. Yemen's entire exports to Saudi Arabia (some \$150–200 million annually in 1991–96) are a fraction of remittance losses of the 850,000 ejected Yemeni citizens from Saudi Arabia and Kuwait.⁶⁹ The displaced Yemenis' material losses are estimated variously (\$3–7 billion).⁷⁰

The Iraq Property Compensation Commission

Forced compensation payments for injury are most notable in the cases of the Iraq Property Compensation Commission (IPCC) now the Iraq Commission for the Resolution of Real Property Disputes, and the United Nations' Compensation Commission (UNCC).

Paul Bremer enacted into law by CPA decree the IPCC, aimed at restitution for the victims of the Anfal campaigns. The initial method of the IPCC dismissed local law, took a narrow view of rights and omitted accumulated world expertise to establish an apparatus for the processing of claims for past dispossession. Comparable ongoing violations were equally without remedy.⁷¹

As recognized in UN Security Council resolutions 1483 and 1511, foreign forces in Iraq, as occupying powers, are bound to comply with standards that prohibit certain forms of eviction, wanton property destruction and population transfer.⁷² Forced evictions, carried out in war or peacetime, do constitute a gross violation of human rights, in particular of the right to adequate housing, as the UN Commission on Human Rights has stressed by unanimously adopting its resolution E/CN.4/RES/1993/77.

Reliable figures assessing the value of war damage to Iraq's housing stock and infrastructure were and remain unavailable. Such a thorough accounting would serve the design and provision of reparations, as in the case of German and Japanese reparations to neighboring countries occupied during World War II, or in the case of Iraq's reparations paid to compensate victims for losses from its 1990–91 occupation of Kuwait, Bosnia, Kosovo, or East Timor.

National Administrative Processes

Commission for Reception, Truth and Reconciliation in East Timor (CAVR)

East Timor's CAVR was established in 2002 (post-independence) as a non-judicial, nationally orchestrated mechanism, tasked with the broad investigation of violations committed in East Timor between 1974 and 1999, the documentation of testimonials relating to those violations and the fostering of grassroots reconciliation for a scope of crimes ranging from sexual violence to

⁶⁹ Paul Sullivan, "Contrary Views of Economic Diplomacy in the Arab World: Egypt," (fall 1999), at: http://findarticles.com/p/articles/mi_m2501/is_4_21/ai_58564190/pg_2.

⁷⁰ Governing Council of the United Nations Development Programme, "Summary Record of the 33rd Meeting," DP/1991/SR.33, 1 July 1991, paras. 27–28.

⁷¹ الاوسط شرق – والسكن الأرض حقوق شبكة: القاهرة) العراق في والسكن الأرض حقوق انتهاك ضحايا تعويض عملية تواجه التي المؤسسية التحديات: القيم استعادة (2005 افريقيا، وشمال also Eric Stover, Hanny Megally, and Hania Mufti – "Bremer's 'Gordian Knot': Transitional Justice and the US Occupation of Iraq," *Human Rights Quarterly*, Vol. 27, No. 3 (2005) 830–57.

⁷² See report of the UN Special Rapporteurs on the human rights dimensions of population transfer, including the implantation of settlers and settlements, E/CN.4/Sub.2/1993/17, June 1993.

abductions to forced displacement.⁷³ The CAVR was intended to focus on “lesser crimes” relating to forced displacement and property damage, whereas “more serious” crimes like torture, rape and murder were primarily associated with the Special Panels and the Indonesian Ad Hoc Tribunal for East Timor.⁷⁴ The tremendous scale of both more-serious and less-serious violations in East Timor during nearly three decades of conflict; however, necessitated that the CAVR be both a far-reaching and a symbolic process through which perpetrators and victims of the full scope of crimes could be mediated and monitored outside of cumbersome and lengthy judicial procedures.

The Commission in Timor Leste, which investigated in great detail economic, social, and cultural rights violations committed by the Indonesian government, found evidence of direct violations of economic and social rights caused by military operations, security concerns, and the political agenda of the government at the time. The Commission noted, among other violations, the explicit use of education as a propaganda tool, thereby restricting children’s educational development and infringing on their right to education⁷⁵; forced displacement and the transfer of entire villages in areas that had previously been avoided on the basis of health risks including poor soil and malarial conditions; and the manipulation of coffee prices to fund military operations, thus limiting farmers’ chances of making an adequate living.⁷⁶

Truth and Reconciliation Commission for Sierra Leone

In addition to the creation of the SCSL for the prosecution of perpetrators of crime, a Truth and Reconciliation Commission (TRC), as well as a Human Rights Commission, were established with the signing of the Lomé Peace Accord in 1999.⁷⁷ The TRC in Sierra Leone is a project driven by civil society, supported by the international community as well the national government and rebel forces of the RUF.⁷⁸

The TRC is mandated to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.⁷⁹ Toward this goal, it called on the HRC to conduct research, hold public sessions and receive testimonies from victims, perpetrators and other witnesses. The Act also called on the TRC to give special attention to women and girls who suffered sexual violence, and child victims. The culmination of

⁷³ *Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, Part 1.I Introduction and Part 2 Mandate of the Commission. The CAVR is recognized in Article 162 of the Constitution of the Democratic Republic of Timor Leste.

⁷⁴ Ibid.

⁷⁵ Brendan O’Malley, United Nations Educational, Scientific, and Cultural Organization, Education Sector, Division for the Coordination of U.N. Priorities in Education, *Education Under Attack: A Global Study on Targeted Political and Military Violence against Education Staff, Students, Teachers, Union and Government Officials, and Educational Institutions* 30-33 (discussing the use of international standards and mechanisms, including the Rome Statute, to prevent and adjudicate crimes against education).

⁷⁶ Timor-Leste Commission for Reception, Truth and Reconciliation, Final Report 3 (2006), p. 5, at: <http://www.ictj.org/en/news/features/846.html>.

⁷⁷ *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, 7 July 1999, hereinafter Lomé Accord.

⁷⁸ Gibril Sesay, Mohamed and Mohamed Suma, *Transitional Justice and DDR: the Case of Sierra Leone*, Research Unit, International Center for Transitional Justice, June 2009.

⁷⁹ Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 1. Available at: <http://www.sierra-leone.org/Other-Conflict/TRCVolume1.pdf>

the TRC's work is a 5,000 page report completed in 2004, which contains 3,500 pages of testimony. The TRC held more than 500 individual hearings, including public and closed sessions, addressing the experiences of victims or former combatants, significant events in the conflict and a range of thematic issues.⁸⁰

The report also contains a series of recommendations, including for the delivery of reparations. During TRC testimonies, many victims and other witnesses expressed their desire to receive compensation for the losses and abuses they suffered, and they hoped that their participation in the TRC processes would result in this material compensation.⁸¹ However, the TRC, unlike the CAVR, had no mandate or budget to provide reparations, only the authority to recommend their dispensation.

The Commission identified the National Patriotic Front of Liberia and Libya as contributors to the war and called on Liberia to make a symbolic contribution to reparations, while it called on Libya to help fund reparations. It also referred participants to the National Commission for Social Action (NaCSA) as the agency responsible for taking care of victims, or to victims' NGOs. NaCSA has now been designated by the government to implement the TRCs recommendations pertaining to reparations.⁸²

In 2008, the United Nations Peacebuilding Fund provided US\$3 million in funding for the reparations program and the newly elected government of President Ernest Bai Koroma also made in-kind contributions for an initial period of one year. In September 2008, a Directorate of Reparations was established within NaCSA, and a National Steering Committee was created, chaired by NaCSA and the International Organisation of Migration. It includes two representatives from civil society and victims groups.⁸³

In line with the recommendations of the TRC, victims were to be provided services in the following areas⁸⁴:

- Amputees: Free physical health care; education; and housing for the most vulnerable.
- Other War Wounded:
 - Free physical health care to the degree their injury or disability requires;
 - Surgery for those in need;
 - Housing for the most vulnerable.
- Victims of Sexual Violence: Free physical health care; free fistula surgery for those in need; free HIV/AIDS and STI testing and treatment. Subject to availability of funds, housing may also be provided for the most vulnerable victims.
- Children: Free physical health care; educational support.
- Community/Symbolic Reparations: Commemoration ceremonies; memorials; symbolic

⁸⁰ Sesay and Suma, 2009.

⁸¹ Ibid.

⁸² See http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=30&Itemid=66

⁸³ Sesay and Suma, 2009.

⁸⁴ Ibid.

- reburials;
- Free mental health care (counseling and psychosocial support) in all chiefdoms [emphasis added].

While the TRC, as a complimentary mechanism to the SCSL, was only intended initially to fulfill a truth-finding function for the delivery of satisfaction to victims its work compelled the delivery of reparations. While the content of reparations awarded in Sierra Leone is both material and symbolic, its focus is on certain groups of victims; war wounded, victims of sexual violence and children, and on the provision of specific services to these victims. Restitution and financial compensation for losses resulting from violations of the right to housing are not specifically addressed within the ambit of reparations in Sierra Leone, despite the prosecution and conviction of perpetrators of violations of victims housing rights as crimes against humanity.

In the resource-strapped country of Sierra Leon, both the Lomé Peace Accord⁸⁵ and the Truth and Reconciliation Commission called for reparations, beyond the TRC’s original framework. The TRC report noted, particularly, the economic hardship of the most-afflicted of victims⁸⁶—“amputees, war wounded, women who suffered from sexual abuse, children and war widows”⁸⁷—underscoring the need to improve their living conditions through services. The TRC did not call for cash outlays, but recommended the provision of “health care, pensions, education, skills-training and microcredit projects, community and symbolic reparations.”⁸⁸ The report recognized the importance to the victims of improved living conditions for the most vulnerable through rehabilitation and services.⁸⁹

Other Examples

In Chile, the National Commission of Truth and Reconciliation (NCTR) drew out the facts of serious human rights violations, but was limited to forced disappearances and arbitrary killings. Even with such a narrow mandate, the NCTR’s final report (1991) recommended that the state adopt measures to improve the living conditions of the surviving victims of abuse, including by way of social security, health programs, education housing and other human needs and rights. As a result, the Chilean Parliament passed Law 19.123,⁹⁰ which provided for a monthly pension, a one-off payment of up to one year’s pension, and other health and educational benefits. The Law also created the National Corporation for Reparations and Reconciliation to implement the

⁸⁵ Lomé Accord, Article XXIII provides that “The Parties through the National Commission for Resettlement, Rehabilitation and Reconstruction agree to seek funding from and the involvement of the UN and other agencies, including friendly countries, in order to design and implement a plan for voluntary repatriation and reintegration of Sierra Leonean refugees and internally displaced persons, including non-combatants, in conformity with international conventions, norms and practices.” Article XXVIII.2 provides “2. Given that women have been particularly victimized during the war, special attention shall be accorded to their needs and potentials in formulating and implementing national rehabilitation, reconstruction and development programmes, to enable them to play a central role in the moral, social and physical reconstruction of Sierra Leone.” Article XXIX establishes a Special Fund for War Victims in conjunction with the Government of Sierra Leone and the international community.

⁸⁶ Sierra Leone Truth and Reconciliation Commission, Vol. 2, Chapter 4, para. 6.

⁸⁷ *Ibid.*, para. 57.

⁸⁸ *Ibid.*, para. 100.

⁸⁹ *Ibid.*, para. 22–26.

⁹⁰ Congreso Nacional de Chile, Ley 19.123, 8 February 1992, at: <http://www.acnur.org/biblioteca/pdf/6787.pdf>.

NCTR recommendations to ensure that such benefits ensured a measure of economic stability for the survivors.

In the post-Fujimori years, the Peruvian government publicly acknowledged responsibility before the Inter-American Commission for forced sterilization, primarily of rural and indigenous women, under the Fujimori Family Planning Policy.⁹¹

In national reparation processes, we have the examples of housing, land and property restitution programs in South Africa.⁹² These, coupled with a Constitution⁹³ rich in guarantees of ESCR, have formed the context for compatible jurisprudence on such milestone cases as *Grootboom*,⁹⁴ *Richtersveld*⁹⁵ and others.⁹⁶

In the case of Morocco, The Truth and Reconciliation Commission's primary objectives are specified in Article 9 and include establishing the truth about past violations, providing reparations to victims and families, and recommending measures aimed to prevent future abuses. However, the process excluded naming and/or prosecuting perpetrators. Rather than adopting a narrow view of reparations, Article 9 recognizes reparations as comprising "medical and psychological re-adaptation, social integration, settlement of administrative, legal, and professional problems, and restitution of property."⁹⁷ The Commission expressed its determination to treat "the issue of reparations in a symbolic and material form, involving individuals, *communities* and *regions*."⁹⁸ The Commission thus recommended "communal reparations" to strengthen the economic and social development of specific regions that were

⁹¹ *María Mamérita Mestanza Chávez v. Peru*, Petition 12.191, ACtHR, Report No. 71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003).

⁹² Truth and Reconciliation Commission of South Africa, *5 Truth and Reconciliation Commission of South Africa Report*, 191, 193, 316, 319, at: <http://www.doi.gov.za/trc/report/finalreport/TRC%20VOLUME%205.pdf>. See also Monty J. Roodt, Land Restitution in South Africa, in *Returning Home*, supra note 44, at 243, R 243–71.

⁹³ For example, the South African Constitution (1996), stands as an example of the right to property functioning as a means to realize other human rights, as well as of the state's obligation in the process. The Constitution provides that "no law may permit arbitrary deprivation" (Article 25.1). Expropriation is permitted, if prescribed by law, in the public interest or for a public purpose and it is subject to compensation (Article 25.2). The same article defines the public interest as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (para. 4). It establishes that compensation should reflect "an equitable balance between the public interest and the interests of those affected" (para. 3) and specifies the duty of the State to fulfill the right to property in respect to land: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis." Thus, a person or community whose land tenure is insecure as a consequence of *apartheid* is entitled "either to tenure which is legally secure or to comparable redress" (25.6).

⁹⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000), at: <http://www.saflii.org/za/cases/ZACC/2000/19.html>.

⁹⁵ *Alexkor Ltd and Another v. Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), at: <http://www.saflii.org/za/cases/ZACC/2003/18.html>.

⁹⁶ For example, see affirmation of rights to "free, prior and informed consent" in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008).

⁹⁷ Veerle Opgenhaffen and Mark Freeman, "Transitional Justice in Morocco: A Progress Report" International Center for Transitional Justice (November 2005), at: <http://www.ictj.org/images/content/1/9/197.pdf>. According to Moustapha Raissouni, 18 cases of property restitution were recommended by the Commission, and one was implemented to date; however, those not reported in the Moroccan Equity and Reconciliation Commission (three-part summary of the final report, part. 2 (Int'l Ctr. for Transitional Justice (December 2005), <http://www.ictj.org/static/MENA/Morocco/IERreport.findingssummary.eng.pdf>

⁹⁸ The Moroccan Equity and Reconciliation Commission, Summary of the Findings of the Final Report 11 (Int'l Ctr. for Transitional Justice, (December 2005), at: <http://www.ictj.org/static/MENA/Morocco/IERreport.summary.eng.pdf> [emphasis added].

particularly affected by political violence and were marginalized and excluded.⁹⁹ (Note: such “collective” reparations are not associated only with ESCR.)

UN Register of Damage

In a 2004 advisory opinion, the International Court of Justice concluded that by Israel’s construction of the wall in the occupied Palestinian territory.¹⁰⁰ The Court found that Israel had violated various international law obligations incumbent upon it¹⁰¹ and that, since the construction of the wall entailed the requisition and destruction of homes, businesses and agricultural holdings,¹⁰² “Israel has the obligation to make reparation for the damage caused to all the natural and legal persons concerned.” The Court’s opinion advised the General Assembly that it is of its view that “the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion. One month later, the General Assembly requested the UN Secretariat to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion.¹⁰³ In further action, the General Assembly adopted a legal definition of the right to remedy and reparation for victims in March 2006,¹⁰⁴ and at the end of that year adopted the resolution to establish the UN Register of Damage (UNRoD).¹⁰⁵ The three-person UNRoD Board adopted revised Rules and Regulations Governing the Registration of Claims in June 2009,¹⁰⁶ including eligibility criteria, and field workers began operation in the fall of that year.

The UNRoD Rules contain a number of provisions that may raise issues in light of the obligation of the Office to respect the “principles of due process of law,”¹⁰⁷ and the need to develop mass-claims procedures sensitive to the specific vulnerabilities and needs of victims. While the Board’s decisions on eligibility and admission of claims are final and not subject to appeal, the Rules lack of an explicit commitment to that rejections be in writing, and lack provision for reconsideration in light of factors such as the discovery of new evidence.¹⁰⁸ The initial burden of producing evidence lies solely with claimants without any *ex officio* or discretionary duty on the part of the UNRoD to assist in establishing eligibility by accessing existing records or consideration of well-established factual circumstances relative to some categories of claims.¹⁰⁹

⁹⁹ Royaume du Maroc, Instance Equité et Réconciliation, La Réparation, at : http://www.ier.ma/article.php3?id_article=1432; Royaume du Maroc, Instance Equité et Réconciliation, Les Recommandations, http://www.ier.ma/article.php3?id_article=1433.

¹⁰⁰ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, 9 July 2004, General List No. 131, at: <http://www.un.int/wcm/webdav/site/palestine/shared/documents/advisoryopinion.pdf>.

¹⁰¹ Ibid, para. 143.

¹⁰² Ibid., para. 152.

¹⁰³ Resolution ES-10/15, 2 August 2004, para. 4.

¹⁰⁴ “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,” A/RES/60/147, 21 March 2006.

¹⁰⁵ “Establishment of the United Nations Register of Damage caused by the Construction of the Wall in the Occupied Palestinian Territory,” A/ES-10/L.20/Rev.1, 15 December 2006.

¹⁰⁶ U.N. Register of Damage Rules and Regulations Governing the Registration of Claims art. 7 (June 19, 2009), available at <http://www.unrod.org/docs/UNRoD%20Rules%20and%20Regulations.pdf> [hereinafter UNRoD Rules].

¹⁰⁷ Ibid., Article 3.

¹⁰⁸ Ibid., Articles 12(5) and 14(2).

¹⁰⁹ Ibid., Article 8(1).

Claimants are required to establish “a legal interest in the claimed damage” and that the claimed damage be “material,” without providing criteria or a definition of materiality. The Board has been slow in accepting “public claims” (i.e., claims submitted by public bodies, or on behalf of damages to public interest), and the Rules do not account for losses to the environment and biosphere, nor allow for losses, damages and costs arising from denial of self-determination, life and limb damages, or opportunity costs. While the UNRoD has remained silent about the disposition and methodology for managing and storing of data and documentary claims collected, it denies the claimants the right to a copy of their claim. Despite the legal logic of gathering evidence of damage leading to remedy and reparations, the UNRoD has no such mandate and the founding resolutions do not foresee such a process.

The Palestinian Authority has established a National Committee for the Register of Damage, which functions to support claimants and advocate for their interests. However, its services do not compensate for the lack of transparency and uncertainties experienced by claimants who cooperate with the UNRoD.

Common Shortcomings

The continuing underenforcement of economic, social, and cultural rights in the transitional justice context is reflected in the fact that when truth commissions have actually investigated violations of these rights, they have generally fallen short of proposing reparations to redress the documented violations.

Despite these cases in which the state recognizes its obligation to extend reparations for past harm done at the official level, implementation is not universal. Of the recognized rights to material restitution of properties by the Moroccan Equity and Reconciliation Commission, few of those recommendations have been carried out.

Problematic to the design and administration of reparations is the fact that parties liable for reparation payments, such as in post-1947 Palestine and post-2003 Iraq, are also the prevailing victors. Thus, no party has demonstrated the will and capacity to assess the housing and infrastructure damages arising from the invasion and occupation. Despite the contributions of coalition and non-coalition States to the development of human rights and the laws of war, implicated politicians do not favor legal culpability as a framework for financing or implementing Iraq’s reconstruction.

Despite its findings (above), the Timor Leste Commission, decided not to consider victims of economic and social rights violations as beneficiaries for reparation. That omission was for reasons of “feasibility and needs-based prioritization,”¹¹⁰ despite the jurisprudence of prosecution and conviction of gross violations of ESCR (above).

¹¹⁰ Timor-Leste Commission Report, op. cit., part 11, at 40–41.

No truth commission, prosecution or reparations process yet foreseen for the victims of Zimbabwe's "Operation Murambatsvina," which is characterized by a mass exercise in the gross violation of ESCR affecting over 700,000 people in 2005.¹¹¹ Subsequently, Zimbabwe has been branded as a failed state.

The incorporation of victims' right to remedy and repair is needed to broaden the picture of traditional retributive justice. Whereas Nuremberg and the Tokyo Tribunals emphasized retributive punishment and attribution of individual and collective culpability for then war crimes and crimes against humanity, a more formal incorporation of victims' right to remedy and repair into judicial mechanisms has fostered new methods for the resolution of international and internal armed conflict. Restorative indicators, such as victim participation in legal proceedings have been incorporated into international judicial mechanisms; however, difficulties incorporating restorative mechanisms into the judicial process have left the determination and implementation of reparations for victims of war crimes, crimes against humanity and the crime of genocide, largely to a range of external, nonjudicial mechanisms. As a result, reparations have not been mainstreamed in judicial sentencing of perpetrators of gross, serious and criminal violations of international law.

In delivering both the retributive and restorative aspects of remedy, the ICC offers the most promising venue for victims. As we learned Chapter 2, the opportunity for victims to raise claims and participate in all aspects of the justice process, from the submission of evidence to the trial phase, makes the ICC the most progressive forum for the delivery of a holistic remedy. Moreover, the Court is authorized to determine and order reparations. In the next Chapter, we will explore the extent to which the ICC has the potential to fulfill victims' right to reparations and detail how victims of violations of the HRAH and all concerned parties can access and utilize this mechanism.

Implementing Reparations:

Implementing ESCR rights, or human rights generally, are subject to the state's duty to ensure seven fundamental conditions as a matter of treaty obligation. The seven over-riding principles in the first three articles of the Covenants, in their composite, require that the state perform its duties by ensuring:

- Self-determination of peoples within the state (and promotion of the same extraterritorially),
- Nondiscrimination on any arbitrary grounds,
- Equality of women and men,
- Rule of law,
- Progressive realization of human rights (i.e., nonretrogression in the enjoyment of ESCR),
- The application of the maximum of available resources and

¹¹¹ U.N. Special Envoy on Human Settlements Issues in Zimbabwe, *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina*, 67, delivered to the Secretary-General (July 18, 2005), at: http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf.

- International cooperation.

Lessons and Conclusions

At the base of most conflicts and liberation struggles lies the deprivation of a range of ESCR, and the Tunisian Revolution is by no means an exception. True also to the norm is the fact that the ensuing conflict often leads to further violation of those same rights, requiring remedies in the immediate- and long-term nature. In surmounting these challenges, we are guided by lessons derived from a near century of judicial and administrative practice.

On the positive side:

1. Historically, ESCR violations have been treated as crimes and gross violations—in armed conflict and nonconflict situations—both for purposes of prosecution (jurisprudence) and, subsequently, in international codification.
2. Distinct from earlier examples of prosecution, victims have an increasing voice and democratic role in providing evidence and seeking remedy.
3. Various degrees and forms of reparations have been carried out to address these crimes.
4. Previously, such reparations were the subject of administrative measures, not linked to adjudication or the processes or rulings of prosecution; however, the two practices of prosecution and reparations (to the extent achieved) have merged in the hybrid of the ICC, allowing for two tracks of reparations, as a norm of international practice.

Continuing challenges include:

1. Tribunals have demonstrated an underenforcement of economic, social, and cultural rights in the transitional justice context, as reflected in the fact that, when truth commissions have actually investigated violations of these rights, they have generally fallen short of proposing reparations to redress the documented violations, or the implementation of such proposals have been insufficient.
2. Generally, double standards and discrimination prevail in determining which civilian groups are eligible for reparations, and monitoring and enforcement mechanisms are still needed to ensure nondiscrimination in the delivery of reparations.
3. Judges and other mechanisms (e.g., VTF of the ICC) need support with methodologies for accurately determining costs, losses and damages arising from gross violations of ESCR.
4. The need for methodologies in quantifying actual damages, costs and losses arising from ESCR gross violations and, for this purpose, further civil and juridical efforts are needed to ensure accuracy as an element of fairness, to reveal the actual consequences of such violations and to rationalize outcomes.

Locally:

5. Reparations processes guide longer-term remedial process and policies, particularly guiding in the case of Tunisia and other post-revolutionary societies in transition.
6. In the final hurdle, a failure to succeed in the such reparation of ESCR violations and their longer-term remedy risks to dash popular expectations, the rights and entitlements of victims and unravel the gains of the transition itself.

Considering the totality of international practice and norms relative to remedy and reparations of gross violations of economic/social/cultural rights, the picture is uneven. Some victims have been able to access reparation mechanisms and processes, while analogous cases have left many victims unserved. Nonetheless, the prospect of progress and improvement in the practice is promising in light of greater study, the exchange of transitional justice experiences and the development of methodologies to quantify losses, costs and damages arising from gross violations. The object of international law as developed is to realize the victim's rights to remedy and reparations'. Moreover, the advance of the quantification and reparation processes—particularly coupled with prosecutions—also promise to clarify the actual costs of such violations toward greater political will to deter them.