

COMMENTS

REPARATIVE APPROACH TOWARDS VICTIMS OF ARMED CONFLICT: GLOBAL EXPERIENCES AND LESSONS FOR INDIA

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DOI: 10.21684/2412-2343-2018-6-1-127-158

In recent years, relentless efforts have been made worldwide for repairing the past harms done to victims of armed conflict. There has been a paradigm shift in international human rights law to addressing the victims' need for reparation rather than emphasizing punishment for the perpetrators. A rights-based approach has been adopted towards making amends for the harm caused to victims in the past. Reparation is such a rights-based approach, a diverse complementary form of justice to restore the life of the victims/survivors by means of restitution, compensation, rehabilitation, satisfaction and guarantee of non-recurrence of the violations upon the victims. Effective and inclusive response to violations during armed conflict and addressing those wrongs by way of reparation has become a priority within the international community to sustain peace and development in conflict-ridden countries. India, over the last few decades, has faced persistent violence perpetrated through armed conflict in regions such as Jammu and Kashmir as well as the North East. The lives of common people have been unsettled as a result of incessant killings, rapes and other brutalities. This article explores the development of reparation in the regime of international law and its implication for the victims of armed conflict. It underlines the initiatives of countries emerging from armed conflict in addressing the plight of victims by means of a reparative approach and argues that India needs to adopt a framework to reach out to those whose lives have been destroyed as the result of such violence and provide necessary reparation to them.

Keywords: armed conflict; reparation; human rights violations; victims; international law.

Recommended citation: Bhabani Sonowal & Dipa Dube, *Reparative Approach Towards Victims of Armed Conflict: Global Experiences and Lessons for India*, 6(1) BRICS Law Journal 127–158 (2019).

Introduction

Reparation is a right-based comprehensive approach, a diverse complementary form of justice to restore the lives of victims/survivors of violence. The concept of reparative justice is based on the premise that a crime represents a debt owed not only to the state but the victim, the victim's family and the community as a whole.¹ Reparations are owed when (a) one party, the "perpetrator," has wronged another party, the "victim," (b) the perpetrator has thereby harmed the victim, and (c) the perpetrator now can do something to compensate for the crime.² In all its forms, reparative activity attempts to undo the moral, psychological, material and relational damage made by wrongdoing.³

Reparation is thought to be "the physical embodiment of a society's recognition of, and remorse and atonement for harms inflicted."⁴ It is about making amends for damage: it is a mechanism to acknowledge and compensate victims for the harm suffered and the rights violated.⁵ Reparation, in a broader sense, in the context of international law, refers to all means that could be employed to remedy the various harms that are inflicted upon victims as a consequence of crimes.⁶

The establishment of the United Nations in response to the "untold sorrow to mankind" brought about during World War II and the adoption of various international instruments laid the basis for a right to remedy and reparation for gross violations of human rights. The international tools where the glimpse of the right to reparation is reflected since the inception of the United Nations are Article 91 of the Additional Protocol I to the Geneva Convention, 1949, Article 3 of the IV Hague Convention,

¹ Dipa Dube & Bhagwan R. Gawali, *Reparative Justice for Rape Victims in India*, 1(3) International Journal of Advanced Research in Management and Social Sciences 257 (2012).

² Michael Ridge, *Giving the Dead Their Due*, 114(1) Ethics 38 (2003).

³ Rhoda E. Howard-Hassmann & Anthony P. Lombardo, *Framing Reparations Claims: Differences Between the African and Jewish Social Movements for Reparations*, 50(1) African Studies Review 27 (2007).

⁴ Eric Stover & Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2004).

⁵ Navsharan Singh, *Thinking Reparations in the Context of Impunity in Landscapes of Fear: Understanding Impunity in India* 300, 301 (P. Hoening & N. Singh (eds.), New Delhi: Zubaan, 2014).

⁶ See the papers in *State Responsibility and the Individual: Reparation in Instances of Grave Violation of Human Rights* (A. Randelzhofer & C. Tomuschat (eds.), The Hague: Martinus Nijhoff Publishers, 1999).

1907, Article 8 of the Universal Declaration of Human Rights (UDHR), 1948, Article 2, clause 3 of the International Covenant on Civil and Political Rights (ICCPR), 1966, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 14 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 1984, Article 39 of the Convention on the Rights of the Child, 1989, Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), 2010 and Article 75(1) of the Rome Statute, 1998. However, for international legal practitioners the challenge remained as to who would fall under the category of victims and what types of violations might be redressed by reparation.

This led to the adoption of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 which meticulously defined the universally accepted term of “victims.” Further, the 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, 2005 comprehensively interpreted the term “reparation” to constitute rehabilitation, restitution, compensation, satisfaction and guarantees of non-repetition within its ambit.

A number of nations across the globe emerging from armed conflicts⁷ have adopted the reparative approach to redress the claims of victims. South Africa, Cambodia, Guatemala, Colombia and others bear evidence of reparative measures undertaken within the legal regime to effectively respond to victims’ needs. India, with its long-standing history of conflict in the Kashmir valley and terrains of the North Eastern Region, and the resulting violations of rights and loss of life, has failed to adopt any comprehensive framework for the reparation of victims. The criminal justice system provides several mechanism for compensation and rehabilitation for victims, but the law fails in its reach. The identification of victims of armed conflict as well as the nature of harms perpetrated tends to create an ambivalence whereby redress of victims’ rights remains a distant dream. Specific instances of interventions by the executive or judiciary have been noted, but no holistic or comprehensive plan has been developed over the years.

The present paper sifts through the global initiatives in reparation of victims of armed conflict by highlighting the different reparative measures adopted by countries emerging from armed conflict and argues that India needs to take appropriate steps in this direction.

⁷ Here, and throughout this paper, the terms “armed conflict” and “conflict” exclusively refer to *internal* armed conflict, i.e. where the conflict is between the State and rebel forces, and, as such, is not of an international character.

1. Need for Reparation

Reparation is an approach that acknowledges the obligation of the state, or the individuals or groups, to repair the aftermath of violations which were either directly committed upon people or were the result of the failure to protect them.⁸ Reparations are needed to amend the damage caused to the victims as a result of the infringement of their rights. It is a known fact that crime has enormous impact and leaves behind tenacious scars in mind and body, disturbing the moral, mental and physical equilibrium of the victims. To many, it becomes a life-changing event, and their struggle to recover themselves from the harm remains a never-ending process. In the fight to penalize the wrongdoer and get justice from the criminal justice system, their recognition as victims and their consequent rights go unnoticed or undermined. Thus, reparation as a measure can reconstruct the moral, physical and emotional equilibrium of the victims which has been disturbed by the offender's infringement of the victims' rights.⁹

Imperatively, reparation as a rights-based approach has the potential to achieve both objectives at once. By way of reparation, victims' rights in a criminal justice system can be recognized as well as their lives restored by empowering them with their rights, on the one hand, and making the responsible parties acknowledge their responsibilities towards the victims and the survivors, on the other, thus decreasing the alienation between victims and the criminal justice system.¹⁰ As argued by Cavadino and Dignan,¹¹ "Reparation if successfully achieved could prove to be an excellent method of putting into practice the 're-integrative shaming' process for offenders", which John Braithwaite¹² posits as "the key to successful crime control, with resulting benefits to society as a whole," eventually making the criminal justice system more humane for both the victims and the offenders.

It is worth mentioning that in recent times reparations have undoubtedly become an inevitable part of transitional justice processes in redressing victims'

⁸ ICTJ, *Reparation & Transitional Justice* (Jan. 6, 2019), available at <https://www.ictj.org/our-work/transitional-justice-issues/reparations>.

⁹ Cited in Michael Cavadino & James Dignan, *Reparation, Retribution and Rights*, 4(4) *International Review of Victimology* 233 (1997); see also David Watson et al., *Reparation for Retributivists in Mediation and Criminal Justice: Victims, Offenders and Community* 212 (M. Wright & B. Galaway (eds.), London: SAGE Publications, 1989).

¹⁰ Cavadino & Dignan 1997, at 235; see also Joanna Shapland et al., *Victims in the Criminal Justice System* 53 (London: Gower, 1985).

¹¹ Cavadino & Dignan 1997, at 236; see also Michael Cavadino & James Dignan, *The Penal System: An Introduction* 42–44 (London: SAGE Publications, 1992); see also James Dignan, *Reintegration Through Reparation: A Way Forward for Restorative Justice?* in *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* 231 (A. Duff et al. (eds.), Manchester; New York: Manchester University Press, 1994).

¹² John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

harm, supplementing the traditional perpetrator-focused criminal justice system.¹³ As penned by Pablo de Greiff,

Reparations are an important part of many transitional justice processes, both in alleviating victims' suffering and to balance concessions and demobilization packages made to combatants.¹⁴

2. Recognition of Reparation as a Right in International Law

The recognition of reparation as a right or obligation in respect of victims dates back to the famous case *Factory at Chorzow*¹⁵ in 1928 before the Permanent Court of International Justice. The judgment of the court embodied the vital fundamentals which underlie the right to reparation. The court stated:

It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form... reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution would bear... Such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

The judgment mainly established two forms of reparation, namely compensation and restitution to the aggrieved party. Primarily these two components lay down the basic foundation for the idea of reparation, which has in turn been advanced through interpretations in human rights jurisprudence, in particular.¹⁶ Though the judgment is basically emphasized in the context of the law of state responsibility, the principles laid out here apply only among private entities. It indicates that the State has an obligation to ensure that individuals whose rights have been violated

¹³ Luke Moffett, *Reparations for "Guilty Victims": Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms*, 10(1) *International Journal of Transitional Justice* 146 (2016).

¹⁴ Pablo de Greiff, *DDR and Reparations: Establishing Links between Peace and Justice Instruments in Building a Future on Peace and Justice* 321 (K. Ambos et al. (eds.), Heidelberg: Springer, 2009).

¹⁵ *Factory at Chorzow (Germ. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9 (July 26).

¹⁶ Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* 29 (Cambridge: Cambridge University Press, 2012).

should receive reparation from the responsible party.¹⁷ Here, the responsibility of reparation for victims of human rights violations and whose rights have been violated by state agents come into question. In cases of serious violations of human rights, it becomes clearly impossible to achieve *restitutio in integrum*, that is to say, to re-establish the situation that existed before the wrong done.¹⁸ There was no mechanism under international law for individuals to seek redress for violations committed by their own state or state agents. Traditionally it was perceived under international law that the wrongs committed by a State against its own citizens were of domestic importance and would fall within the State's own jurisdiction, whereas wrongs committed by one State against nationals of another State could only be pursued to seek redress for the damage from the other State by those wronged asserting their rights.¹⁹

However, in the past few decades, with developments in international humanitarian law and human rights law, there have been significant shifts in the recognition of the victim's right to reparation. The establishment of the United Nations and the adoption of the U.N. Charter and the Universal Declaration of Human Rights and the International Covenant on Human Rights paved the way for the victims of human rights violations to claim their legitimate right for reparation under international law. It was recognized that human rights violations were no longer exclusively matters of domestic concern, but rather, in gross violations, the involvement of international law was warranted.²⁰ Furthermore, international human rights law progressively recognized that the victims of gross human rights violations could pursue their claims for redress and reparation before the criminal justice system of the State to which they belonged and, if necessary, can also pursue their claims before international forums.²¹ Gradually, as a result of the normative set up of the international bodies, victims claims to seek remedy and reparation were incorporated within the corpus of the international human rights mechanisms, to which States, in particular, became parties, and thereby legally bound by their principles.

2.1. Reparation Under International Humanitarian Law

Before the recognition of the concept of reparation under international humanitarian law, compensation was prevalent as a mode of reparation to the victim.

¹⁷ Godfrey Musila, *Principles on Court-Ordered Reparations: A Guide for the International Crimes Division of the High Court of Uganda*, *Avocats Sans Frontières* (October 2016) (Jan. 6, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=290617.

¹⁸ Evans 2012, at 29.

¹⁹ OHCHR, *Rule-of-Law Tools for Post-Conflict States: Reparation Programmes* (2008), at 5 (Jan. 6, 2019), available at <https://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>.

²⁰ *Id.*

²¹ *Id.*

The reference to reparation by means of compensation can be traced back to the IV Hague Convention, 1907,²² where it is enshrined under Article 3 that,

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The imprint of the same is again reflected in Article 91 of the Additional Protocol I to the Geneva Convention.²³ However, there was a lack of interpretation on Article 91 of the Additional Protocol I, as the right of the victims to seek redress was restricted only to financial compensation provided under the Protocol.²⁴ There was no comprehensive understanding or interpretation on the notion of reparation under available international humanitarian law, which thus influenced the development of victims' right mechanisms within international human rights law.

2.2. Reparation Under International Human Rights Law

International human rights laws are no less significant in consolidating the legal basis for the victim's right to remedy and reparation in matters of gross human rights violations. The right to remedy and reparation is firmly embodied within the entity of the available human rights mechanisms.²⁵

The origins of reparation in human rights law stem from the adoption of the UDHR in 1948,²⁶ as Article 8 states that,

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by laws.

Article 2, clause 3 of the International Covenant on Civil and Political Rights (ICCPR), 1966 explicitly describes the obligation of the State to ensure effective remedy for the individuals whose rights have been violated. In addition to this, Article 9, clause 5 and Article 14, clause 6 of the ICCPR provide compensation for the victims' of unlawful arrest, detention and conviction.²⁷ Again, the International Convention

²² Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277.

²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3.

²⁴ *Id.*

²⁵ OHCHR, Rule-of-Law Tools, *supra* note 19, at 5.

²⁶ Evans 2012, at 34.

²⁷ U.N. General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

on the Elimination of All Forms of Racial Discrimination, 1965, while emphasizing the elimination of any kind of discrimination embodied under Article 6, enunciates the State's responsibility to ensure effective remedy and reparation or satisfaction for any damage suffered as a result of such discrimination.²⁸ Imperatively, Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 1984 entitles victims of torture to receive redress and adequate compensation, which also includes the right to rehabilitation that is as full as possible.²⁹ The Convention on the Rights of the Child, 1989 recognizes the inalienable rights of the child and child victims. Article 39 of the Convention acknowledges

the State responsibility to take appropriate measures to ensure rehabilitation and promotion of physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other forms of cruel, inhuman or degrading treatment or punishment; or armed conflicts.³⁰

Again, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), 2010 makes a significant contribution in consolidating the legal basis of reparation in international human rights law.³¹ Article 24(4) of the ICPPED affirms the right to reparation for the victims of enforced disappearances. Article 24(4),(5) states:

Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation covers material and moral damages and, where appropriate, other forms of reparation, such as (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.

2.3. Reparation Under International Criminal Law

A significant development in international criminal law is the establishment of the International Criminal Court under the Rome Statute, 1998. It is the first of its kind to

²⁸ U.N. General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195.

²⁹ U.N. General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

³⁰ U.N. General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

³¹ U.N. General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 U.N.T.S. 3.

explicitly include reparation for victims.³² The Rome Statute recognizes the victims as an aid to the administration of justice and confers upon them the right to express their views and claim compensation.³³ It gives victims a central position within the international criminal justice system.³⁴ The Rome Statute creates a regime for reparation under Article 75(1),³⁵ which provides that the International Criminal Court shall establish principles relating to reparation for victims, including restitution, rehabilitation and compensation. Under Article 79, the ICC shall wherever necessary make an order for reparation to be made through the Trust Fund provided for.³⁶ With the adoption of the Rome Statute and the creation of the ICC, the inclusion of the victims of abuse of power has turned out to be a source of inspiration in international law.³⁷

2.4. Notion of Victims and Their Rights

Reparation as a principle of international law was incorporated in the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.³⁸ This document has frequently been hailed as the Magna Charta for victims of crime³⁹ and has, by now, been widely acclaimed as the “Victims’ Bill of Rights.”⁴⁰ It contains a bill of rights which inspired and continues to inspire many subsequent international and domestic protocols on victims’ rights.⁴¹ The Declaration consists of two parts: (A) Victims of Crime and (B) Abuse of Power.

2.4.1. Victims of Crime

According to the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, “victims,”

³² Jo-Anne Wemmers, *Victim Reparation and the International Criminal Court*, 16 *International Review of Victimology* 123 (2009).

³³ See Roy S. Lee, *Introduction in Victims and Witnesses in the International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (R.S. Lee (ed.), Ardsley: Transnational Publishers, 2001).

³⁴ Conor McCarthy, *Reparations Under the Rome Statute of the International Criminal Court and Reparative Justice*, 3(2) *International Journal of Transitional Justice* 250 (2009).

³⁵ U.N. General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998 (Jan. 6, 2019), available at <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>.

³⁶ *Id.*

³⁷ Wemmers 2009, at 124.

³⁸ U.N. General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Resolution, adopted by the General Assembly, 29 November 1985, A/RES/40/34.

³⁹ *Victims of Crime and Abuse of Power* (E. Vetere & P. David (eds.), Vienna: United Nations Press, 2005).

⁴⁰ Nirmala R. Umanath, *Nameless Faceless Victims in Criminal Justice System* (Gurgaon: LexisNexis, 2016).

⁴¹ Jan J.M. van Dijk, *Benchmarking Legislation on Crime Victims: The UN Victims Declaration of 1985 in Victims of Crime and Abuse of Power*, *supra* note 39, at 202.

means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.⁴²

A person may be considered a victim, under the Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Under the Declaration, four basic rights of victims are recognized. They are:

(i) Access to Justice and Fair Treatment

Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harms that they have suffered.⁴³ Victims should be informed of their right to seek redress through the mechanisms provided by law.⁴⁴

(ii) Restitution

The Declaration makes it obligatory that offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.⁴⁵

Governments are bound to review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.⁴⁶

Where it is found that public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted, that the violation was committed by, then the State is responsible for the restitution.⁴⁷

(iii) Compensation

The Declaration provides that States are obliged to pay compensation to the victims if it is not fully available from the offender or other sources. States should

⁴² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 38, para. 1.

⁴³ *Id.* para. 4.

⁴⁴ *Id.* para. 5.

⁴⁵ *Id.* para. 8.

⁴⁶ *Id.* para. 9.

⁴⁷ *Id.* para. 11.

endeavor to provide financial compensation to the victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and also to the families of the victims.⁴⁸ The establishment, strengthening and expansion of national funds for compensation to victims are to be taken up by the States.⁴⁹

(iv) Assistance

The Declaration provides for the creation of a provision for assistance to victims which includes the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.⁵⁰ Victims should be informed about the availability of health and social services and other relevant assistance and be readily afforded access to them.⁵¹ States should sensitize the police, justice, health, social service and other personnel concerned through proper guidelines and training to ensure proper and prompt aid.⁵² In providing services and assistance to victims, attention should be given to those who have special needs.⁵³

2.4.2. Victims of Abuse of Power

States should consider incorporating into national law norms prescribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and compensation, and necessary material, medical, psychological and social assistance and support.⁵⁴ States should periodically review existing legislations and practices to ensure their responsiveness to changing circumstances; they should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.⁵⁵ The Declaration, therefore, paves the way for holistic support and assistance to victims of crime as well as those abused by state authorities.

⁴⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 38, para. 12.

⁴⁹ *Id.* para. 13.

⁵⁰ *Id.* para. 14.

⁵¹ *Id.* para. 15.

⁵² *Id.* para. 16.

⁵³ *Id.* para. 17.

⁵⁴ *Id.* para. 19.

⁵⁵ *Id.* para. 21.

2.5. 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

The essential elements that constitute reparation have been reaffirmed in the International Law Commission's Draft Articles on State Responsibility (2001) and the Basic Principles on the Right to Reparation for Victims (2005). Subsequently, the whole concept of reparation was given a broader meaning in 2005 by a U.N. resolution.⁵⁶

In 2005, the U.N. General Assembly adopted the 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.⁵⁷ The 1985 Declaration basically deals with victims of crime and abuse of power, whereas the 2005 Basic Principles deals with victims of international crimes as instances of violation of international law.⁵⁸ The Basic Principles and Guidelines assert that victims have a right to prompt, adequate and effective reparation.⁵⁹ This includes – in some combination and as appropriate – restitution, compensation for harm and rehabilitation in mind, body and status.⁶⁰ Measures to satisfy victims such as revealing the truth, holding perpetrators accountable and ceasing ongoing violations are also steps that may have a reparative effect. Likewise, actions to prevent recurrence should accompany reparations, as this offers reassurance to victims that reparation is not an empty promise or a temporary stop-gap.⁶¹

The principles enumerated in the document to benefit the victims include:⁶²

- *Restitution*, which refers to those measures that seek to restore the victim to the original situation before the gross violations occurred. Restitution includes, as appropriate, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.⁶³

- *Compensation* "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances

⁵⁶ Kathleen Daly & Gritana Proietti Scifoni, *Reparation and Restoration* in *Oxford Handbook of Crime and Criminal Justice* 207 (M. Tonry (ed.), Oxford: Oxford University Press, 2011).

⁵⁷ U.N. General Assembly, *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*, Resolution, adopted by the General Assembly, 16 December 2005, A/RES/60/147.

⁵⁸ Umanath 2016.

⁵⁹ Basic Principles and Guidelines, *supra* note 57.

⁶⁰ *Id.*

⁶¹ Lisa Magarrell, *Reparations in Theory and Practice*, International Center for Transitional Justice (Jan. 6, 2019), available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>.

⁶² Pablo De Greif, *Justice and Reparation* in *The Handbook of Reparations* 451 (P. de Greiff (ed.), New York: Oxford University Press, 2006).

⁶³ Basic Principles and Guidelines, *supra* note 57, at Principle 19.

of each case."The claim for compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; material damage and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.⁶⁴

- *Rehabilitation* refers to measures that provide social, medical, and psychological care, as well as legal and social services.⁶⁵

In addition to these, the other measures within transitional justice which have potential reparation effects are *satisfaction and guarantee of non-recurrence*:

- *Satisfaction*, which includes effective measures such as cessation of continuous violations; they are especially measures such as the cessation of violations to truth-seeking and verification of the facts. Verification of the facts, and full and public disclosure of the truth, search for the whereabouts of the disappeared, provide judicial and administrative sanctions against perpetrators, institutional reform, public and official apology, including acknowledgement of the facts and acceptance, thereby restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim.⁶⁶

- *Guarantees' of non-recurrence*, ensuring effective civilian control of military and security forces; strengthening the independence of the judiciary; protecting human rights defenders, promoting the standard of human rights in public institutions; promoting mechanisms for preventing and monitoring social conflicts and their resolution.⁶⁷

These measures address the suffering of victims in two different ways: first, by addressing the loss suffered by the individual, the property destroyed and the mental injury incurred thereby and, second, the harm inflicted on the community as a whole, resulting in collective loss of trust in the legal and public institutions.

In its broad understanding, "reparation" that underlies the Basic Principles and Guidelines attempts redress for gross human rights violations of international humanitarian and human rights law. As reparation involves a multifarious approach, there has always been a concern among human rights lawyers worldwide as to what types of violations should be covered within the purview of reparation or which

⁶⁴ Basic Principles and Guidelines, *supra* note 57, at Principle 20.

⁶⁵ *Id.* at Principle 21.

⁶⁶ *Id.* at Principle 22. See, e.g., Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4.Sub.2/1993/8. More recent updates have not changed the categories. For an interesting discussion on the development of these principles, see Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents in Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* 11 (K. De Feyter et al. (eds.), Antwerpen: Intersentia, 2005).

⁶⁷ Basic Principles and Guidelines, *supra* note 57, at Principle 23.

violations should be subject to reparation.⁶⁸ Therefore, a universally accepted definition of “victim” was adopted under the U.N. Basic Principles and Guidelines, 2005.⁶⁹ Later on, the same definition was adopted by various national reparation programs in different countries.⁷⁰ The response towards the reparative approach at the domestic level in many countries shows mixed outcomes due to the existence of the rule of law in each particular country. In some parts of the world where there is an inability to establish regional human rights courts, and in countries which have not acceded to the objectives of U.N. treaty bodies to allow for individual complaints, victims have become more vulnerable for they are unable to claim their rights for remedies, neither at the domestic level nor at the regional or international level.⁷¹ For example, India is not a signatory to the Rome Statute of the ICC and the Additional Protocol II of the Geneva Convention, nor is there any existing national mechanism for individual claims for reparation for gross violations of international humanitarian and human rights law.

On the other hand, in many countries the mass claim for reparation is not fruitful due to lack of proper interpretation of victims within the justice system. For example, the harm inflicted upon individuals with regard to counter-terrorism activities who were extraordinarily tortured and abused in the United States were denied reparations as the courts have routinely said civil claims for reparations cannot proceed in U.S. courts because they would reveal state secrets.⁷² At the same time, there have been positive developments as well with regard to mass claims for reparations in other countries. One of the best known attempts to grapple with legacies of gross human rights violations is the South African experience where “Truth and Reconciliation” has been held up as a model for addressing mass atrocities while building a firm foundation for stability and post-conflict reconciliation.⁷³

⁶⁸ Musila, *supra* note 17.

⁶⁹ “Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” (para. 8). “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim” (para. 9).

⁷⁰ See the reports by the Truth and Reconciliation Commissions in South Africa, Peru and Morocco.

⁷¹ Francesca Capone et al., *New Developments in the Law of Reparations*, British Institute of International and Comparative Law, 28 January 2014 (Jan. 6, 2019), available at https://www.biicl.org/documents/206_6820_latest_development_in_reparations_-_event_report_final_-_28_january_2014.pdf?showdocument=1.

⁷² *Id.* at 3.

⁷³ Traggy Maepa, *The Truth and Reconciliation Commission as a Model of Restorative Justice in Beyond Retribution: Prospects of Restorative Justice in South Africa*, Monograph No. 111, Institute for Security Studies, Pretoria, South Africa (T. Maepa (ed.), 2005), at 66 (Jan. 6, 2019), available at <https://issafrica.s3.amazonaws.com/site/uploads/Mono111.pdf>.

Another significant development in mass claims for reparations is in the countries with internal armed conflict.⁷⁴ Those countries, through a transitional justice process, and by means of appointing a Truth and Reconciliation Commission, have attempted to address the post-conflict society that witnessed gross human rights violations (e.g. South Africa, Guatemala, Haiti and Peru).⁷⁵ The countries emerging from conflicts are always vulnerable and lack the persistent rule of law and active law enforcement mechanisms. In such a situation, it is pertinent to have a more holistic approach to address the plight of the victims to restore their lives. As the U.N. Secretary-General, in his report on the rule of law and transitional justice in conflict and post-conflict societies, persuasively argued:⁷⁶

Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting, and dismissals, or an appropriately conceived combination thereof.

3. Global Initiatives Towards Reparation for Victims of Armed Conflict

It is noteworthy that the implementation of reparative measures is more viable in the transitional justice process while acknowledging the myriad violations and abuses of fundamental rights that take place particularly during conflicts and under arbitrary regimes.⁷⁷ A number of countries emerging from conflict have been able to implement reparative measures through diverse approaches each suitable for the particular country. Some of such approaches are discussed below.

3.1. Colombia

With its legislative approach to addressing the victims of armed conflict, Colombia has gained significant attention in implementing a reparation program in its post-conflict society. Colombia has experienced one of the longest civil wars in the world, since the 1960s, and has for decades ranked as having the highest homicide rate in the world.⁷⁸ In 2003, the Colombian government resorted to reparation measures for the victims of conflict by adopting specific legislation aimed at reducing the

⁷⁴ Reparation to the victims of armed conflict in Guatemala, Cambodia, Colombia, South Africa.

⁷⁵ OHCHR, Rule-of-Law Tools, *supra* note 19, at 11.

⁷⁶ U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, U.N. Doc S/2004/616, 23 August 2004, para. 26 (Jan. 6, 2019), available at <https://www.securitycouncilreport.org/un-documents/document/PCS%20S%202004%20616.php>.

⁷⁷ OHCHR, Rule-of-Law Tools, *supra* note 19, at 11.

⁷⁸ Evans 2012, at 205.

accountability of perpetrators and establishing a national truth commission.⁷⁹ Subsequently, in 2005, the Colombian government introduced the Justice and Peace Law that constructed victimhood and primary responsibility for reparations around crimes committed by illegal armed groups, avoiding responsibility of the state. As the legislation denied state responsibility, subsequently, due to immense pressure exerted by victims groups on the Colombian government, in 2011, the Victims and Land Restitution Law was implemented, under which claims could be made by victims against atrocities committed by the state armed forces.⁸⁰ The legislation introduced the requirement that for persons killed by state forces to be eligible to claim reparation, a criminal investigation needed to be completed to determine that the person had not been a member of an illegal armed group.⁸¹

3.2. Cambodia

In Cambodia, a hybrid tribunal was set up to address victims and establish accountability for those responsible for genocide and gross human rights violations during the Khmer Rouge regime of 1975–1979. During its reign, the regime allegedly caused the deaths of approximately 1.7 million Cambodians, by execution, starvation and forced labor.⁸² In 2004, the United Nations and the government of Cambodia engaged in protracted negotiations which were followed with a draft agreement for a hybrid tribunal to be funded by the Government of Cambodia and the United Nations. This draft was subsequently codified as the law on the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to prosecute the perpetrators involved in crimes during the Khmer Rouge regime.⁸³ Even though the law was established, it lacked direct mention of a victims unit, whereas such a Victim Support Section was established by the Internal Rules, which was adopted soon after the establishment of the ECCC. The Internal Rules basically provide for moral and collective reparation for the victims.⁸⁴ The Internal Rules contain a very innovative

⁷⁹ Evans 2012, at 203.

⁸⁰ Law No. 975 of 2005 (Ley de Justicia y Paz), Arts. 5, 42 & 45; subsequently, Law No. 1448 of 2011 (Ley de Víctimas y Restitución de Tierras), Art. 3. See also Moffett 2016.

⁸¹ Moffett 2016, at 157.

⁸² See ICTJ, Cambodia: Background – A Long Road to Justice (Jan. 6, 2019), available at <https://www.ictj.org/our-work/regions-and-countries/cambodia>.

⁸³ Stan Starygin, *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC): Setting an Example of the Rule of Law by Breaking the Law?*, 3(2) Journal of Law and Conflict Resolution 20 (2011); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); the law revised previous legislation from 2001 (Jan. 6, 2019), available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf. See also Lilian A. Barria & Steven D. Roper, *Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia*, 7(1) Human Rights Review 5 (2005).

⁸⁴ ECCC Internal Rules, 5th rev. ver. (February 2010).

feature wherein for the first time in the history of the International Criminal Court the victims were recognized as the civil parties to the case.⁸⁵ In 2006, the ECCC began operations to prosecute Khmer Rouge senior leaders and those “most responsible” for genocide, crimes against humanity and other serious abuses during the conflict.⁸⁶ Over 30,000 people visited the court to watch the trial hearings and millions more watched the proceedings on television or online.⁸⁷ In 2011, the ECCC indicted five people responsible for gross human rights violations and convicted one.⁸⁸ In a remarkable move the Trial Chamber of the ECCC on 16 November 2018, convicted the two Khmer Rouge senior leaders Nuon Chea and Khieu Samphen for crimes against humanity and genocide and for grave breaches of the mandates of the Geneva Conventions of 1949 during the Khmer Rouge regime of 1975–1979.⁸⁹ The two men were sentenced to life imprisonment.

3.3. Guatemala

Guatemala again stands in a unique row in discharging reparation to victims of armed conflict. Guatemalan history is marked as the most structural injustice and marginalization of the indigenous people of the century, as a result of the thirty-six years (1960–1996) of internal armed conflict between the government and the insurgent groups.⁹⁰ Following a peace agreement in 1994, the Truth Commission, formally known as the Historical Clarification Commission (CEH), was agreed to unearth the decades-long internal armed conflict in the country during the years from 1960 to 1996.⁹¹ Subsequently, the CEH was officially set up in 1997. After working for two years, its final report was made public on 25 February 1999.⁹² The report estimated 250,000 deaths and disappearances in the three decades. In over 80 percent of all human rights abuses, the victims were native Mayan, and in more than 90

⁸⁵ ECCC Internal Rules, Rule 23; *see also* Historic Achievement in International Criminal Law: Victims of the Khmer Rouge Crimes Fully Involved in Proceedings of the ECCC, Statement of the Victims Unit, 4 February 2008 (Jan. 6, 2019), available at <http://www.eccc.gov.kh/english>.

⁸⁶ ICTJ, Cambodia, *supra* note 82.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ NUON Chea and KHIEU Samphan Sentenced to Life Imprisonment in Case 002/02, ECCC Press Release, 16 November 2018 (Jan. 6, 2019), available at https://www.eccc.gov.kh/sites/default/files/media/20181116%20Case%20002.02%20Press%20Release_ENG_Final.pdf. *See also* Khmer Rouge: Cambodia's Years of Brutality, BBC News, 16 November 2018 (Jan. 6, 2019), available at <https://www.bbc.com/news/world-asia-pacific-10684399>.

⁹⁰ *See* ICTJ, Guatemala: Background – Justice Delayed (Jan. 6, 2019), available at <https://www.ictj.org/our-work/regions-and-countries/guatemala>.

⁹¹ Evans 2012, at 149.

⁹² In total, the complete report of the CEH encompasses twelve volumes and consists of more than 4,000 pages.

percent of all the violations cases the perpetrators responsible were presumed to be state security agents.⁹³ The report concluded that the violence was fundamentally committed by the State against the poor, Mayans and those who fought for equity and justice.⁹⁴ In its recommendations, the CEH established a broad platform for a comprehensive reparation policy as well as for institutional reform. The Commission initially recommended the responsible parties to the conflict acknowledge the violations committed and apologize for the same. The Commission specifically recommended that the reparation program should be based on the principles of restitution, compensation, rehabilitation and satisfaction, and restoration of the dignity of the victims.⁹⁵ The Commission further recommended the establishment of a National Commission for the Search of Disappeared Children in response to reported incidences of disappearances during the armed conflict.⁹⁶ A recommendation was also forwarded to pass a bill of law whereby forced disappearances would be legally recognized for reparation and other matters of succession. Additional recommendations in the report included provisions relating to guarantees of satisfaction and non-repetition.⁹⁷ Initially, civil society and victims' organizations were very reluctant to pursue faithful compliance with the recommendations.⁹⁸ It was only with the collaborative commitment of the U.N. Mission, United Nations Development Programme (UNDP) and interested nations that had constructively contributed⁹⁹ to the establishment of the Truth Commission in Guatemala, 200 significant cases were initiated before the Inter-American Court on Human Rights by 2000.¹⁰⁰ Subsequently, reparations were awarded by order of the Inter-American Court on Human Rights to the Guatemalan Cases. The Guatemalan reparation program is considered to be the most comprehensive National Reparation Program.

4. India's Approach Towards Reparation for Victims of Armed Conflict

Simply stated, India is yet to initiate any comprehensive reparative approach towards victims of armed conflict in Jammu and Kashmir, and in the North Eastern

⁹³ CEH Report, Vol. 5, Arts. 2 & 15.

⁹⁴ Evans 2012, at 152.

⁹⁵ CEH Report, Recommendations, paras. 7–21 (Jan. 6, 2019), available at <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf>.

⁹⁶ *Id.* para. 24.

⁹⁷ Evans 2012, at 154.

⁹⁸ Christian Tomuschat, *Clarification Commission in Guatemala*, 23(2) Human Rights Quarterly 233 (2001).

⁹⁹ Significantly, countries such as the United States, Spain and the European Union.

¹⁰⁰ Evans 2012, at 158.

Region. The decades-long armed conflict, between the state forces and the insurgent groups, have changed the landscape of those areas into conflict zones and hundreds of thousands of civilian people have been victimized due to the protracted armed conflict.¹⁰¹

Following in the footsteps of the colonial power, the Government of India adopted the Armed Forces Special Powers Act (AFSPA), 1958 in response to the Naga secessionist movement in the North Eastern States. In other words, it can be said that the Act was introduced to provide legal protection to the army operations aimed at dominating the Independent Naga rebels.¹⁰² Rather than emphasizing the demands of the indigenous people, the central government responded to the disturbed situation with the model used under colonial rule by implementing the AFSPA, initially in the State of Assam and later extended to the entire North Eastern Region, which comprises the states of Manipur, Assam, Meghalaya, Tripura, Arunachal Pradesh, Mizoram and Nagaland.¹⁰³ Conferring the same power, another Act, the Armed Forces Special Powers Act, 1990 was enacted and extended to the State of Jammu and Kashmir. This Act conferred unaccountable powers on the security forces to the extent of causing death on suspicion alone, destroying and dumping properties on suspicion that they were sheltering militants or armed volunteers, entering into any premises for search and seizure, and arresting any person without a warrant.¹⁰⁴ Moreover, the security personnel were provided with immunity under the Act¹⁰⁵ and no legal proceedings could be carried out against them without due sanction from the central government.

Powers were specifically conferred on the security forces to act in adverse situations in the disturbed areas and to control any sort of rebel movements. The object was to provide utmost flexibility to the army in its operations against so-called "insurgent" groups – big and small.¹⁰⁶ But the legislators did not foresee how power without accountability would be prone to misuse to the extent of mass killings. With the passage of time, the powers under the Act became an important tool for the

¹⁰¹ *Landscapes of Fear: Understanding Impunity in India*, *supra* note 5.

¹⁰² Sanjib Baruah, *Routine Emergencies: India's Armed Forces Special Powers Act in Civil Wars in South Asia: State, Sovereignty, Development* 190 (A. Sundar & N. Sundar (eds.), New Delhi: SAGE Publications, 2014).

¹⁰³ The North Eastern Region (NER) comprises eight States: Assam, Manipur, Nagaland, Mizoram, Meghalaya, Tripura, Arunachal Pradesh and Sikkim. Initially, AFSPA, 1958 was invoked only in the Naga-inhabited areas of Assam and Manipur. Gradually in 1972 it was extended to the entire North Eastern Region except Sikkim. However, in 2015 the act was revoked in respect of the State of Tripura, removed from Meghalaya in 2018 and at present the act is applicable only to the entire State of Assam, Nagaland, Manipur (except the Imphal municipal areas) and revoked in respect of eight bordering Police Stations of Arunachal Pradesh.

¹⁰⁴ The Armed Forces (Special Powers) Act, 1958, sec. 4.

¹⁰⁵ *Id.*

¹⁰⁶ Baruah 2014, at 192.

security forces to routinely resort to grave human rights violations in the form of extrajudicial killings, custodial deaths, forced disappearances and sexual abuse.

A major concern in the whole spectacle has been the serious apathy shown towards the victims¹⁰⁷ of State oppression. The people affected as the result of the protracted armed conflict have not received due attention of the State to their restitution and rehabilitation. The victims have generally approached the judiciary¹⁰⁸ and human rights commissions for “adequate compensation,” and only in a few cases have the same been paid, while in most cases things remain undecided, defeating the purpose of reparation for the poor victims of the region. Another major concern has been the mass casualties committed by the State agencies.

Violations of human rights by the security forces have become a day to day affair for the people of the conflict regions in the past few decades.¹⁰⁹ Human rights violations by state forces engaged in counter-insurgency operations¹¹⁰ in the region have occurred with depressing regularity over the last five decades; they includes beatings, electric shock and simulated drowning. Arbitrary arrests and extrajudicial executions¹¹¹ are common. An early report by the U.N.¹¹² revealed that the region witnessed mass violations by the armed forces. According to a report by an independent organization,¹¹³ a total of 1,528 people, including 31 women and 91 children, have been killed in the name of “encounters” with militants by security forces between 1979 and May 2012 in the State of Manipur (one North Eastern State). During “Operation Birdie” in 1997–1998, many Khasi tribal women were reportedly raped. The Assam Rifles¹¹⁴ also used women as human shields, in violation of the laws of war, in a retaliation attack on the

¹⁰⁷ The term “victim” has been defined in the Criminal Procedure Code, 1973 under sec. 2(wa) as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged. In the context of the present study, the term has been limited to persons who have suffered loss or injury as a result of the unlawful acts of armed forces operating in the North Eastern States.

¹⁰⁸ *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 S.C.C. 109; *Extra Judicial Execution Victim Families Association (EEVFAM) and Others v. Union of India and Others*, A.I.R. (2016) S.C. 3400.

¹⁰⁹ ACHR, India Human Rights Report 2007 (2007) (Jan. 6, 2019), available at <http://www.achrweb.org/reports/india/AR07/asom.htm>.

¹¹⁰ Getting Away with Murder: 50 Years of Armed Forces (Special Powers) Act, Human Rights Watch (August 2008) (Jan. 6, 2019), available at <https://www.hrw.org/legacy/background/2008/india0808/>.

¹¹¹ Mandy Turner & Binakalshmi Nepam, *Armed Violence and Poverty in Northeast India*, report for AVPI, Centre for International Cooperation and Security (March 2005) (Jan. 6, 2019), available at <https://www.bradford.ac.uk/cics>.

¹¹² Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Human Rights Council, U.N. Doc. A/HRC/23/47/Add.1, 26 April 2013 (Jan. 6, 2019), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf.

¹¹³ Sailajananda Saikia, *9/11 of India: A Critical Review on Armed Forces Special Powers Act (AFSPA) and Human Right Violation in North East India*, 2(1) Journal of Social Welfare and Human Rights 265 (2014).

¹¹⁴ Assam Rifles is the oldest paramilitary force in India.

National Socialist Council of Nagaland (NSCN).¹¹⁵ Particularly, women in Mizoram were prone to violations by security personnel, including rape, sexual violence and arbitrary detention.¹¹⁶ Crimes against tribal women by the security forces were a feature of the conflict in Tripura. One of the most widely known incidents was the 1988 gang rape of fourteen tribal women in Ujanmaidan by the Assam Rifles.¹¹⁷

Similar incidents are also reported from the Kashmir valley due to the protracted armed conflict between the government security forces and the armed militant groups waging a separatist movement. There have also been widespread complaints of torture and arbitrary detention. Thousands of people have “disappeared” in Jammu and Kashmir since the beginning of the conflict.¹¹⁸ According to data by the Asian Human Rights Commission, more than 8,000 people have disappeared after they were arrested by law enforcement agencies since 1989 when the armed conflict started in Kashmir. The majority of them were non-combatant Kashmiris.¹¹⁹ Throughout the years, the actual number of casualties caused is never really known by anyone. People have died in police custody, have disappeared, and with no exact records of their being found. The only official records present on the government portal¹²⁰ give the minimum number of casualties in those conflict zones; and the numbers are questionable.

4.1. Initiatives Towards Reparation

While there is no existing reparation policy available in India for the victims of armed conflict, there is a policy document under the Ministry of Home Affairs (MHA) which includes compensation for those affected by extremist attacks, and reimbursement and development initiatives in insurgency-affected regions of the country.¹²¹ The strategy of the policy document is to maintain harmony and peace, fulfilling the prerequisites for the growth of the individual, on the one hand,¹²² and fulfilling the aspirations of society and building a strong, stable and prosperous nation, on the other.¹²³ The document further states that the union government

¹¹⁵ Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958 (Justice (Retd) B.P.Jeevan Reddy Committee), Part III (2005), at 52 (Jan. 6, 2019), available at <http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf>.

¹¹⁶ Getting Away with Murder, *supra* note 110, at 12.

¹¹⁷ *Id.* at 14.

¹¹⁸ Justice: Action Against Enforced Disappearance, Asian Human Rights Commission, 22 April 2003 (Jan. 6, 2019), available at <http://www.ahrchk.net/ua/mainfile.php/2003/434/>.

¹¹⁹ *Id.*

¹²⁰ Ministry of Home Affairs, Government of India, Annual Budget Report.

¹²¹ Singh 2014, at 307.

¹²² Outcome Budget, 2010–2011, Ministry of Home Affairs, Government of India (2011) (Jan. 6, 2019), available at <https://mha.gov.in/sites/default/files/OB%28E%292010-11.pdf>.

¹²³ *Id.*

conjointly with the state governments of Jammu and Kashmir is pursuing a multi-prolonged strategy to bring about peace and harmony.¹²⁴ The major element of this framework is the special funds to the State Government by way of reimbursement for various types of Security Related Expenditure (SRE),¹²⁵ including expenditure on carriage of constabulary, rent for accommodations, airlift charges, the rising cost of the Indian Reserve Battalion, and various other relief and rehabilitation measures for migrants, widows, orphans and militancy-affected persons.¹²⁶

According to the annual report of 2017–2018,¹²⁷ the total amount reimbursed from 1989 to the financial year 2016–17 under Security Related Expenditure (Police)–SRE (P) was 6,871.52 crores. During the financial year 2017–18, up to 31 December 2017 a sum of 627.87 crores had been reimbursed to the Government of Jammu and Kashmir under SRE (R&R).

Fig. 1: Statement of Assistance Provided Under the Security Related Expenditure (SRE) Scheme (Jammu and Kashmir)

Funds Released	Crores
1989–2017	6,871.52
2017–2018	627.87

Source: Ministry of Home Affairs (Annual Report 2017–2018).

Similarly, there are schemes for SRE reimbursement in the North Eastern States that is implemented by the Ministry of Home Affairs in the states of Assam, Nagaland, Manipur, Meghalaya and Arunachal Pradesh, which includes (a) payment of ex-gratia to the next of kin of the state police personnel and civilians killed in militant violence, (b) providing logistics support to the Central Paramilitary Forces, (c) maintenance of designated camps of militant groups with whom the Central Government/State Government have entered into Suspension of Operations agreements, (d) surrender and rehabilitation of militants as per approved schemes, (e) special training for State Police Personnel for counter-insurgency operations and (f) raising of India Reserve BNS.¹²⁸

¹²⁴ Outcome Budget, 2010–2011, *supra* note 122, para. 1.6.

¹²⁵ *Id.* para. 1.8.

¹²⁶ *Id.*

¹²⁷ Annual Report, 2017–2018, Ministry of Home Affairs, Government of India (2018) (Jan. 6, 2019), available at <https://mha.gov.in/sites/default/files/MINISTRY%20OF%20HOME%20AFFAIR%20AR%20201718%20FOR%20WEB.pdf>.

¹²⁸ Annual Report, 2008–2009, Ministry of Home Affairs, Government of India (2009) (Jan. 6, 2019), available at <https://mha.gov.in/sites/default/files/AR%28E%290809.pdf>.

Fig. 2: Statement of Assistance Provided Under the Security Related Expenditure (SRE) Scheme (North Eastern States)

Funds Released	Assam	Nagaland	Manipur	Tripura	Meghalaya	Arunachal Pradesh	Total (Crores)
2012–13	112.86	69.36	20.62	11.32	–	50.74	264.90
2013–14	159.18	42.50	25.01	42.18	16.60	4.53	290.00
2014–15	106.69	57.88	37.76	27.23	12.61	18.83	261.00
2015–16	140.07	67.61	45.78	12.98	12.63	0.93	280.00
2016–17	148.70	61.48	31.86	36.62	9.19	12.15	300.00
2017–18 (Up to 31 Dec 2017)	221.51	13.16	9.23	16.60	12.60	10.90	284.00

Source: Ministry of Home Affairs (Annual Report 2017–2018).

In addition to the SREs, there are also development initiative programs introduced by the MHA in the North Eastern States and various schemes for rehabilitation of surrendered militants in the North East. Significantly though, this SRE varies every year, for there is no credible accounting procedure for the amounts.¹²⁹ There are no details published on the government portal of the disbursement of the SRE under different headings in the Annual Budget. Therefore, the money allotted for the victims for “Relief and Rehabilitation” from the SRE amounts are not transparent. For instance, where there were disappearances and custodial killings in the North East, compensation was never paid to the victims’ families.¹³⁰ The SRE has failed to meet the expectations of the victims specifically due to lack of transparency. This is evident in various government reports where the Comptroller and Auditor-General of India (CAG) have censured the state governments for not obtaining audit certificates for SRE or for misuse of funds.¹³¹ Instead of being a proper holistic mechanism for reparation, these have become instruments of impunity in the hands of State forces.

¹²⁹ Singh 2014, at 310.

¹³⁰ Researcher’s personal interview with the victims’ families in Manipur.

¹³¹ See Audit Report for the Year Ended 31 March 2006, Security Related Expenditure, Performance Review, para. 3.1.7, p. xi; see also CAG Raps J&K Govt for Diverting SRE Funds, The Times of India, 7 April 2002 (Jan. 6, 2019), available at <https://timesofindia.indiatimes.com/india/CAG-raps-JK-govt-for-diverting-SRE-funds/articleshow/6161334.cms?>.

4.2. Existing Compensatory Measures Under the Criminal Justice System in India

The Criminal Justice System in India is basically concerned with the offender and the crime; therefore, reparation as a whole is still a distant dream in India. As observed by the Supreme Court in *Ratan Singh v. State of Punjab*:¹³²

It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of the law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature.

However, the development of compensatory jurisprudence in India has to some extent consolidated the legal basis for the victim's right to seek remedy. As stated by Justice G. Yethirajulu,¹³³

Compensation to victims is a recognized principle of law being enforced through the ordinary civil courts in India.

Over the years, the court has expanded several provisions of the Constitution and interpreted those provisions in a manner that remedies could be availed for violations of human rights through which the victim's right to compensation could be claimed. Thus, the emergence of compensatory jurisprudence in view of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all people irrespective of the absence of any express constitutional provision and judicial precedent.¹³⁴

4.2.1. Statutory Provisions

Though the Constitution of India does not grant any enforceable right to compensation, the Supreme Court by interpretation of Articles 14 and 21 of the Constitution has included the rights of the victims, which includes the right to compensation. Likewise, the provision of part IV of the Constitution, the Directive Principles of State Policy, when liberally interpreted covers victims' claims for compensation. Article 38(1)¹³⁵ provides that,

The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political, shall inform all institutions of national life.

¹³² *Ratan Singh v. State of Punjab*, (1979) 4 S.C.C. 719.

¹³³ (2004) 7 S.C.C. (J) 49.

¹³⁴ *Id.*

¹³⁵ M.P. Jain, *Indian Constitutional Law* 1495 (6th ed., Nagpur: LexisNexis, 2011).

This directive reaffirms what has been declared in the Preamble to the Constitution of India, namely that the function of the Republic is to secure, inter alia, social, economic and political justice.¹³⁶ Again, Article 39¹³⁷ provides for policies to be followed by the state to ensure economic justice and equality, which, when interpreted in manifold ways, may include victims' claims for compensation. Similarly, Article 41, inter alia, states that the state shall make effective provisions for "securing right to work, education and public assistance in the cases of sickness and disablement and also in other cases of undeserved want." The expressions "disablement" and "other cases of undeserved want" could also be interpreted in a way to cover the victims of crime within its purview, and hence the state in a way would have an obligation to assist the victims by way of compensation and fulfill the fundamental rights guaranteed within the Constitution.¹³⁸ Again, under part V of the Constitution of India, Article 51-A makes it a fundamental duty of every citizen of India "to protect and improve the natural environment and to have compassion for living creatures" and "to develop humanism." If empathetically interpreted and imaginatively expanded, we find here the constitutional beginnings of Victimology.¹³⁹ Further, the guarantee against unjustified deprivation of life and liberty (Art. 21) has within it elements the obligation placed on the state to compensate victims of criminal violence.¹⁴⁰ The other important provisions are those for constitutional remedies under Articles 32 and 226, which are enforceable before the courts of law for the violation of human rights of an individual, and also extensively applicable to the victims of crime. The manner in which the position of these articles was indubitably established by the Supreme Court with regard to compensatory jurisprudence may be seen through a series of cases¹⁴¹ which have shifted the court's initial hesitant approach to an assertive and rights-oriented one through the years.

Apart from the constitutional framework, there is legislation that provides for compensation to victims in India: for example, the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985; Consumer Protection Act, 1986; Fatal Accidents Act, 1855; Indian Airlines Non International Carriage (Passenger and Baggage) Regulations, 1980; Indian Railways Act, 1989; Merchant Shipping Act, 1958; Motor Vehicles Act, 1988; Probation of Offenders Act, 1958; Protection of Women from Domestic Violence

¹³⁶ *Air India Statutory Corporation v. United Labour Union*, A.I.R. (1997) S.C. 645.

¹³⁷ Jain 2011, at 1497.

¹³⁸ See Murugesan Srinivasan & Jane Eyre Mathew, *Victims and the Criminal Justice System in India: Need for Paradigm Shift in the Justice System*, 10(2) *Temida* 51 (2007).

¹³⁹ See R. Seyon, *Criminal Justice System: Contemporary Challenges and Judicial Responses with Special Reference to Victims*, 4(2) *International Journal of Research and Analysis* 94 (2016).

¹⁴⁰ Durga Das Basu, *Constitutional Law of India* (Nagpur: Wadhwa & Co., 2003).

¹⁴¹ *Khatri v. State of Bihar*, A.I.R. (1981) S.C. 928; *D.K. Basu v. State of West Bengal*, A.I.R. (1997) S.C. 610; *M.C. Mehta v. Union of India*, A.I.R. (1997) S.C. 3021; *Nilabati Behera v. State of Orissa*, A.I.R. (1993) S.C. 1960.

Act, 2005; and the Sexual Harassment (Prevention, Protection and Redressal) Act, 2013. These are, however, subject-specific and apply only within the contours of the legislative mandate.

4.2.2. Procedural Laws Governing the Compensatory Mechanism

Section 357 of the Criminal Procedure Code (CrPC), 1973 is a comprehensive provision which deals with compensation for victims. This section was inserted in the 1973 Code on the recommendation of the Law Commission of India¹⁴² to recognize the victims and their rights in the criminal justice system. This provision combines the procedures of both the criminal process and the civil process for it would be just and necessary so as to save time and money, instead of seeking remedies in two different courts.¹⁴³ Eventually, the scope and object of Section 357 of the new Code was expanded by the Supreme Court for the first time in *Sawarn Singh v. State of Punjab*¹⁴⁴ wherein it was observed by the Court that:

The law which enables the Court to direct compensation to be paid to the dependents is found in section 357 of the Code of Criminal Procedure (Act 2 of 1974). Under this Section the court is enabled to direct the accused, who caused the death of another person, to pay compensation to the persons who are, entitled to recover damages from the persons sentenced, for the loss resulting to them from such death.

Further, as explained by the Supreme Court while awarding compensation, the Court must take into account the nature of the crime, the injury suffered and the justness of the claim for compensation and the capacity of the accused to pay, and order relevant circumstances in fixing the amount of fine or compensation.¹⁴⁵ In *Hari Singh v. Sukhbir Singh*,¹⁴⁶ the Court, while explaining the purpose of the provision under section 357 CrPC, observed that:

It is an important provision, but courts have seldom invoked it, perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of accused. It may be noted that this power of the court to award compensation is not ancillary

¹⁴² K.N. Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure* 614 (6th ed., Lucknow: Eastern Book Co., 2014).

¹⁴³ *Id.*

¹⁴⁴ *Sawarn Singh v. State of Punjab*, A.I.R. (1978) S.C. 1525.

¹⁴⁵ *Id.*

¹⁴⁶ *Hari Singh v. Sukhbir Singh*, (1988) 4 S.C.C. 551.

to other sentences, but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offense. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

Thus, Section 357(1)¹⁴⁷ stipulates that compensation is payable to the victim for any loss or injury when the accused is punished, and the court imposes a sentence of fine or a sentence of which fine is a part. However, the amount of compensation cannot exceed the fine amount, as the compensation is to be paid out of the fine recovered from the accused. The amount of fine would depend upon the amount of fine imposed for that particular offense and to the extent to which the court is empowered to impose the fine.

Imperative is the liberal interpretation of Section 357(3)¹⁴⁸ which lays down “that compensation may be awarded to the victim even when the court imposes a sentence of which fine does not form a part.” In other words, the power to award compensation is not ancillary to other sentences, but it is in addition thereto. There is also no limit to the amount that may be awarded, which is left entirely to the discretion of the court to decide in each case depending on the facts and circumstances of the case.¹⁴⁹

4.3.3. Victim Compensation Scheme in India

In an attempt to bring the domestic criminal justice system in line with the 1985 U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Criminal Procedure Code, 1973 was amended in 2008 on the basis of recommendations in the 154th Law Commission of India Report.¹⁵⁰ The word “victim” was defined, for the first time, to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged, and the expression includes his or her guardian or legal heir.¹⁵¹ Section 357A was inserted in the 1973 Code, obligating the states to provide for compensation to victims out of the victim compensation fund. For that purpose, each of the states is required to develop a Victim Compensation Scheme (VCS). The scheme makes way for

¹⁴⁷ Criminal Procedure Code, 1973, sec. 357(1).

¹⁴⁸ *Id.* sec. 357(3).

¹⁴⁹ *Rachhpal Singh v. State of Punjab*, A.I.R. (2002) S.C. 2710; *Pankajbhai Nagjibhai Patel v. State of Gujarat*, A.I.R. (2001) S.C. 567.

¹⁵⁰ Law Commission of India, The Code of Criminal Procedure 1973, Report No. 154, 22 August 1996 (Jan. 6, 2019), available at <http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf>.

¹⁵¹ Code of Criminal Procedure, 1973, sec. 2(wa).

an institutionalized payment of compensation to the victim by the state for any loss or injury caused to the victim by the offender. In cases where compensation paid by the accused is inadequate or no such compensation is payable on account of acquittal or discharge of the accused or the offender not being traced or identified, the VCS is applicable.¹⁵² Such payment may also be allowed on the specific recommendations of the court, in addition to the compensable payable under section 357 CrPC 1973. Section 357B CrPC 1973 specifically provides that in cases of acid attack (sec. 326A Indian Penal Code, 1860) and gang rape (sec. 376D Indian Penal Code, 1860), the compensation payable by the state shall be in addition to the payment of fine to the victim under the said sections. The District Legal Services Authority (DLSA) or State Legal Services Authority (SLSA) has been authorized to decide the amount of compensation to be awarded to victims under the scheme, subject to the maximum limit prescribed by the State. In addition to payment of compensation, section 357A also attempts to respond to the immediate needs of the victims for first aid or medical benefit as well as any other interim relief, as may be required.

In pursuance to the legislative amendment, the states have adopted the scheme, though after an initial reluctance and prodding by the courts.¹⁵³ Presently, all the states have made the scheme applicable within their territorial jurisdiction to provide “funds for victims and their dependents, who have suffered loss or injury as a result of the crime and who require rehabilitation.” Thus, the scheme intends to bear significant costs including medical treatment, psychological counselling, etc., of the victims and also provide for their rehabilitation. Unfortunately, however, the word “rehabilitation” has not been defined in the scheme, but left to the discretion of the District Legal Services Authority to decide on the matter. In other words, who requires rehabilitation and what may be included in such rehabilitation have not been spelled out clearly, though through logical inference it may be taken to include medical assistance, psychological counselling, temporary shelter, vocational/professional training in some cases and definitely adequate financial assistance.¹⁵⁴

Seemingly, it has been noted, there is serious anomaly across the states with regard to the scheme of compensation.¹⁵⁵ From the definition of the word “victim” to the object of the scheme to eligibility criteria for compensation, the procedure for grant of compensation, refusal of the application, etc., in all areas the schemes across the states vary.¹⁵⁶

¹⁵² Dipa Dube, *An Analysis of Victim Compensation Schemes in India*, 13(2) International Journal of Criminal Justice Sciences (forthcoming).

¹⁵³ *Suresh v. State of Haryana*, A.I.R. (2015) S.C. 518.

¹⁵⁴ Dube, *supra* note 152.

¹⁵⁵ Sanjeev P Sahni et al., *Victims' Assistance in India – Suggesting Legislative Reform: A Comprehensive Comparative Policy Review 23–58* (New Delhi: ANE Publishing, 2016).

¹⁵⁶ Dube, *supra* note 152.

It may be stated that the scheme maybe somewhat inapt in its application to victims of armed conflict. In the context of armed conflict, access to justice remains a challenge due to the immunity provided to the security forces. Virtually no FIRs are lodged or even accepted by the civil police of the state for atrocities committed by its forces; thereby investigation and judicial process rarely progress. Even the recognition of victims as “victims” is refuted, thereby negating any possibility of their seeking reparation from the state. Further, to invoke the VCS, the victims need to participate in the criminal justice process and cooperate with the machinery. Where the offense itself is denied, the question of its occurrence does not arise. Furthermore, the schedule to VCS makes it applicable to identified offenses under the criminal law of the land. Incidents of mass killings, fake encounters, enforced disappearances, etc., do not feature as offenses therein, because these are mostly state-sponsored violations. There are few instances where the victims have been facilitated with monetary compensation on the orders of the judiciary or National Human Rights Commission or State Human Rights Commissions. The compensation awarded for the infamous Malom Massacre victims after more than a decade is one rare example where such compensation has occurred.¹⁵⁷ Even the operation of these human rights watchdogs are severely deficient, as, for example, in the State of Manipur where atrocities are high, the State Human Rights Commission is in a defunct state, while in the State of Assam, though it is operative, its function is mostly under political influence, whereby it is reluctant to proceed against the state powers. Thus, victims’ access to justice remains mostly tedious and unattainable.

Conclusion

Reparation is a very effective mechanism in addressing the harm perpetrated on victims due to armed conflict. It is also a means to atone for state-sponsored violence against the innocent population. In India, as in many other countries around the globe, the conflicts and consequences therefrom have evolved over the years. Different nations have adopted policies to evaluate the ramifications and provide for appropriate reparation to victims. India, however, has failed to respond to the situation. The criminal law of the land has been grossly inadequate in its application to victims. The rights-based institutions have also failed to redress the harm suffered as a result of armed conflicts. What is needed is a comprehensive victim reparation policy of the state to meet the expectations of victims. Such policy must provide for

¹⁵⁷ See for details the compensation awarded to the victims of the infamous Malom Massacre 2000 in Manipur after fourteen years of long wait Alok Pandey & B. Sunzu, *Manipur’s Malom Massacre: High Court Orders Rs. 5 Lakh Compensation for Victims’ Families*, NDTV, 7 December 2014 (Jan. 6, 2019), available at <https://www.ndtv.com/india-news/manipurs-malom-massacre-high-court-orders-rs-5-lakh-compensation-for-victims-families-709536>. See also Manipur HC Orders Payment of Rs 5 Lakh Compensation to Each Family of Malom Victims, E-Pao, 5 December 2014 (Jan. 6, 2019), available at <http://e-pao.net/GP.asp?src=19..061214.dec14>.

due recognition of “victims,” acknowledgement of wrongs on the part of State in the event of atrocities by its agents, assurances towards security and non-repetition by the State, adequate compensation for harm done, rehabilitation including medical and legal assistance, psychological counselling, shelter, educational expenses, where applicable, employment opportunities, etc. An independent body may be constituted at the regional levels with members of the legislature, executive and judiciary as well as civil society to provide easy access to justice for victims. This body may be entrusted with appropriate powers to hold inquiries into alleged violations, monitor investigation and trial of offenders, provide speedy remedy to victims, etc. This body may further engage in dialogue with State forces working in the region to foster respect for human rights and ensure safety, security and peace in the lives of the local population. A determined state initiative with value strategies to address the current challenges in the conflict-ridden areas will not only redesign but re-engineer the social structure and address the actual needs of the present day conflict scenarios. That will be the beginning of a genuine endeavor for reparation for victims of armed conflict in India.

Acknowledgements

I would like to thank my supervisor Dr. Dipa Dube, who guided me to write this paper and as co-author her contribution is noteworthy.

I would also like to thank the victims of Manipur (North East India) with whom this researcher had the opportunity to interact and learn about their never-ending struggle for justice.

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