Chapter 4 – A Normative Framework for Reparation in Transitional Justice

Chapters two and three evinced that the international law on reparation, as established in chapter one, does not fit the transitional justice situation. Not only does it fail to respond to unique factual challenges. It cannot adequately capture the transformative aim of reparation in transitional justice – namely to (re)establish respect for human rights and generalized horizontal and vertical trust in society. Based on these differences, some argue that the international law on reparation does not apply in transitional contexts. As has been shown before, that position has no legal basis and produces unjust results.[1001] So what remains to be done instead?

A. Introduction: What Tool to Use?

Three ways exist to approach the problem: First, one can distill new rules for reparation in transitional justice from international practice (I.).[1002] Second, one can employ legal concepts, which allow to modify obligations under challenging circumstances, namely the declaration of emergency and necessity (II.). Third, one can adapt existing standards – namely the right to reparation and other relevant human rights – from within through interpretation (III.).

I. Seeking New Standards

The first approach could rely on occasional international practice. The IACtHR postulated principles according to which it would judge domestic reparation programs.[1003] However, the court did not provide a legal basis for these principles. It failed to concretize or even apply them to the cases

1001 See above, Introduction.

1002 For such an approach to transitional justice generally see Bell, *The "New Law" of Transitional Justice*.

1003 IACtHR, *García Lucero et al. v. Chile*, 2013, para 189; IACtHR, *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil*, 2010, para 303; IACtHR, *Manuel Cepeda Vargas v. Colombia*, 2010, para 246.

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cited. It switched to different criteria in subsequent cases.[1004] Other human rights bodies do not follow the approach of the IACtHR. Hence, it is difficult to generate any valid independent norms to guide reparation in transitional justice from this jurisprudence. Relying on state practice proves equally difficult. For independent norms governing reparation in transitional justice to arise from state practice, they would need to take the form of customary international law, backed by settled practice and opinio juris.[1005] Regarding some aspects of reparation in transitional justice, state practice is far from uniform. A case in point is the relationship between special reparation mechanisms and the ordinary judiciary, which differs starkly across transitional justice reparation programs.[1006] While state practice does converge in other areas, states do not provide any normative criteria for their behavior. In some cases, this makes it impossible to distill norms from state practice. Almost all states engage in outreach efforts to inform survivors of the reparation program. But the way they do it and the degree to which they embark on the effort differs starkly. States do not justify these different degrees of outreach. Hence, practice does not provide any normative criteria to measure the degree to which states should conduct outreach.[1007] Even where states give normative criteria for their behavior, they fail to legally justify it, raising doubts whether they act out of a sense of a legal obligation.[1008] For example, states almost uniformly restrict eligibility for reparation to the gravest violations that occurred. But they do not justify why international law permits them to limit the right to reparation of survivors that drastically. By and large, state practice seems neither conclusive nor sufficiently backed by opinio juris to distill adequate independent norms on reparation in transitional justice. Admittedly, the author has not conducted an in-depth review of all transitional justice reparation efforts, precluding him from drawing this conclusion with finality. Additionally, that none or only

1004 Sandoval, *Two Steps Forward, One Step Back - Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes*, 2018 Intl. J. Hum. Rts. 22(9), 1192, 1201 f.

1005 ICJ, *Jurisdictional Immunities*, para 55. The Basic Principles are often cited as a strong instance of state practice in support for norms pertaining to domestic reparation programs. However, only once do they explicitly mention such programs in relation to repairing violations of non-state actors. Other than that, they focus on judicial redress, UNGA, *Basic Principles*, A/RES/60/147, para 16.

1006 See below, G.

1007 See below, D.I.

1008 See below, C.V.

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a few independent rules on reparation in transitional justice can be distilled from practice need not be fatal to the approach. It could simply mean that international law leaves states considerable freedom in that realm. But that is not true. The international law on reparation regulates states' behavior, and there is no normative basis not to apply it in transitional justice. As argued above, the mere fact that the situation presents an enormous challenge to an application is no reason.[1009] Thus, where practice does not provide independent legal standards, the problem persists that the international law on reparation applies to a situation it does not fit. Where independent standards might be discerned, their relationship to the international law on reparation is unclear. This last issue points to a deeper problem with the approach. Independent norms on reparation in transitional justice would need to be a customary lex specialis derogating from the international law on reparation. Because the international law on reparation is largely treaty-based, such derogation would be highly unusual. Customary international law rarely is lex specialis to treaty law.[1010] It is even more difficult to imagine a customary lex specialis derogating from human rights standards to provide less protection. Human rights law does not impose reciprocal but integral obligations on states. States do not owe compliance to individual treaty parties but individual persons and the collectivity of state parties.[1011] This makes it harder for states to derogate from those obligations, as the prohibition of inter se agreements and the modified reservations system for human rights law evince.[1012] Thus, it is doubtful whether state practice alone could

1009 See above, Introduction.

1010 ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits,* para 274; IUSCT, *Amoco International Finance Corporation v. Iran*, IRAN-U.S. C.T.R. 15, Case No. 56, 1987, 189, para 112; ILC, *Fragmentation of International Law - Difficulties Arising From the Diversification and Expansion of International Law,* A/CN.4/L.682, 2006, 79 ff.

1011 Pauwelyn, *Conflict of Norms in Public International Law - How WTO Law Relates to Other Rules of International Law*, 2003, 56 ff.; IACtHR, *Advisory Opinion on the Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, OC-2/82, 1982, para 29 ff.; IACtHR, *Opinión Consultative Sobre la Denuncia de la Convención Americana Sobre Derechos Humanos y de la Carta de la Organización de los Estados Americanos y sus Efectos Sobre las Obligaciones Estatales en Materia de Derechos Humanos,* OC-26/20, 2020, para 51 ff.; EComHR, *Austria v. Italy*, 788/60, 1961, para 19.

1012 ICJ, *Reservations to the Convention on Genocide - Advisory Opinion*, I.C.J. Reports 1951, 15, 23 f.; ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 311 ff.

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result in a new norm derogating from an established human rights norm.[1013] At the very least, because of the prohibition of inter se agreements, state practice would need to establish consent between all parties to the respective human rights conventions.[1014] Practice on reparation in transitional justice is far removed from that unanimity. Therefore, distilling independent norms on reparation in transitional justice from state practice seems inadequate for the situation at hand. Instead, human rights jurisprudence considers state practice as a means of interpretation[1015] – which concords with this study's approach. A broad review of state practice guides the interpretation of the international law on reparation forwarded in this chapter, led by the in-depth review of the six reparation programs examined in chapter two and complemented by a more cursory review of other transitional justice reparation programs worldwide.[1016]

II. Necessity and State of Emergency

Before this interpretation proceeds, one competitor to that approach remains: The reliance on doctrines that modify international obligations, namely necessity or the declaration of a state of emergency. This approach cannot

1013 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 109; Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 2003 Eur. J. Intl. L. 14(3), 529, 536; Killander, *Interpreting Regional Human Rights Treaties*, 2010 Sur - Intl. J. Hum. Rts. 7(13), 145, 149.

1014 Pauwelyn, *Conflict of Norms in Public International Law*, 306; ECtHR, *Öcalan v. Turkey*, 46221/99 para 162 ff.

1015 ECtHR, *Demir and Baykara v. Turkey*, 34503/97 (GC), 2008, para 76; ECtHR, *Soering v. The United Kingdom*, 14038/88 (Plenary), 1989, para 102; Schlütter, *Aspects of Human Rights Interpretation by the UN Treaty Bodies*, in: Ulfstein/Keller (eds.), *UN Human Rights Treaty Bodies - Law and Legitimacy*, *Studies on Human Rights Conventions,* 2012, 261, 292 ff.

1016 The programs cursorily surveyed here were implemented in Argentina, Chile, Timor Leste, Brazil, Malawi, Morocco, Guatemala, Nepal, Peru, Kosovo, South Africa, El Salvador, Northern Ireland, Uganda, Philippines, Bolivia, Mexico, Paraguay, Uruguay, Nicaragua, and Switzerland. In addition, the UNCC and the Trust Fund for Victims of Hissène Habré's Crimes were included in the analysis. It must be noted however that the analysis of some of these programs, e.g. of the TFV of Hissène Habrés Crimes, only rests on their founding legal documents. Sadly, practice shows that implementation is often not as inspiring as the promises made in legislative form. The TFV of Hissène Habré's Crimes is an unfortunate example thereof, HRW, *African Union - No Reparations for Ex-Chad President's Victims*, 2021.

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sufficiently accommodate the exigencies of the transitional justice situation. First, it is disputed whether states can invoke necessity in the realm of human rights. Most human rights treaties allow states to derogate from human rights obligations in a state of emergency, which could preclude necessity pursuant to Art. 25(2)(a) ASR.[1017] Second, even if the necessity defense applied, it would be difficult to meet its requirements.[1018] Art. 25(1)(a) ASR demands that the envisaged measure is "the only way to safeguard an essential interest against a grave and imminent peril." The mere lack of resources to pay reparation will rarely cross that threshold, as the various instances of failed economic necessity claims in international arbitration suggest.[1019] Instead, the state could claim that paying reparation would result in civil unrest, risking a return to the era of systematic human rights violations. However, that claim relies on such an unpredictably complicated causal chain that it will rarely suffice to establish an imminent peril, which can be averted only by forgoing reparation. Third, Art. 25(2)(b) ASR will exclude the defense in most cases because the state contributed to the situation of necessity. The state caused its obligation to repair by violating a primary right, and it usually also contributed to bringing about the transitional justice situation. These three legal obstacles to invoking necessity will often be insurmountable. But more importantly, the application of necessity does not bring about the legal consequences needed in transitional justice situations. If applicable, it does not alter the obligation as such. It only excuses a state's non-performance as long as the circumstances of necessity persist. Afterward, the state must comply with the obligation again.[1020] Art. 27(a) ASR allows for gradual compliance if the situation betters. From this angle, reparation is an optimization problem and must be performed fully as soon as circumstances permit. Necessity thus only allows delaying full reparation. Yet, chapter three evinced that reparation in transitional justice assumes an additional instrumental role of furthering the goals of the transition, namely creating trust and respect for human rights. The standards of chapter one cannot capture this transformative dimension

1017 ICJ, *Wall Opinion*, para 140; Kretzmer, *Emergency, State of*, in: Wolfrum (ed.), *Max Planck Encyclopedia of International Law,* Online Edition 2008, 3 ff.; Ryngaert, *State Responsibility, Necessity and Human Rights,* 2010 Nth. Ybk. Intl. L. 41, 79.

1018 The ILC states on that topic: "[...] necessity will only rarely be available to excuse non-performance on an obligation and [...] is subject to strict limitations to safeguard against possible abuse", ILC, *ASR Commentary,* A/56/10, 2001, art. 31 para 2.

1019 Waibel, *Sovereign Defaults Before International Courts and Tribunals*, 2011, 88 ff.

1020 ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, 7, para 101; Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility,* 2020 Modern L. Rev. 83(6), 1246, 1272.

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warranted by the transitional situation and therefore need to be adapted. Necessity does not leave room for that.

Derogation in a state of emergency does not allow an adequate approach to reparation in transitional justice either. Chapter one already discussed why a state of emergency would likely not permit substantial derogation from the right to reparation for violations committed during the state of emergency.[1021] A state might derogate from the right to reparation once the obligation to repair has arisen and is of such an extent that it imperils the state's functioning. This might be the case in certain transitional justice situations. It is, however, a dangerous road to refer states to. Declarations of emergency can have a "catastrophic effect" on human rights.[1022] Especially in the volatile circumstances of transitional justice, they can come with dangerous side-effects.[1023] Also, as with necessity, declaring a state of emergency reduces the problem to optimization and does not allow adapting standards to the transitional justice logic of transformation.

III. The Limits of Interpretation

Since new standards cannot satisfactorily be distilled or brought into relationship with the existing international law on reparation and neither necessity nor the declaration of a state of emergency provides adequate solutions, normative standards for reparation in transitional justice should be sought through interpretation. That path runs the opposite risk than the one previously considered. Whereas necessity and the declaration of a state of emergency only allow binary solutions, too coarse for the intricacies of reparation in transitional justice, interpretation can easily lead to over-determination. Pellet cautioned against human-rightism and the related confusion of wishful thinking and legal standards.[1024] The chance of falling

1021 See above, ch. 1, A.II.

1022 Mégret, *Nature of Obligations*, in: Moeckli et al. (eds.), *International Human Rights Law,* 2nd Edition 2014, 96, 114.

1023 For a differentiated analysis of the effects on transitions in different states of the executive assuming emergency powers in response to the Covid-19 pandemic, Mollay et al., *Emergency Law Responses and Conflict-Affected States in Transition*, Verfassungsblog, 13 March 2021.

1024 Pellet, "*Human Rightism" and International Law - Gilberto Amado Memorial Lecture*, 2000, 4 f. For the use of the state of emergency in the colonial context see Reynolds, *Empire, Emergency and International Law*, 2017, esp. 111 ff.

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prey to these fallacies is exceptionally high when interpreting a right that has received no authoritative written restatement. Yet, over-determination would be fatal to the present endeavor. As chapter two evinced, transitional justice situations vary widely on numerous levels. Reparation efforts are highly politically and culturally sensitive and contingent on an incalculable number of factors. It is for this reason that the present chapter is entitled normative framework. In complex transitional justice situations, the law can only play a limited role. It can establish a normative baseline, below which states must not fall. Fulfillment of this baseline does not guarantee a good reparation program. Effective reparation in transitional justice requires creativity, ingenuity, and context-sensitivity.[1025] Law cannot prescribe these virtues. It can provide a framework that is for the relevant actors to fill. If the law over determines their choices, it will inhibit instead of enabling the qualities needed to make reparation work effectively in a complex situation. To resist the urge of over-determination, the following chapter will first elaborate on how transitional justice affects the interpretation of the international law on reparation (B.). It will then attempt to adapt the international law on reparation so that it can provide normative guidance to different aspects of reparation programs (C.-H.). The process will be based on the normative standards established in chapter one. The empirical and theoretical findings of chapters two and three provide guide rails along which the adaptation proceeds.

B. Interpretation and Transitional Justice: Methodological Aspects

Adapting the international law on reparation to the transitional justice context does not require a transitional-justice-specific interpretation approach. Nevertheless, some thoughts on how interpretation can and should incorporate the unique features of transitional justice facilitate the endeavor and guard against over-determination.

First, the object of interpretation warrants clarification. As shown in chapter one, the right to reparation is treaty-based, customary international law, and a general principle of international law. To simplify, the following

1025 On the latter see as a particularly well-researched example among many, Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice – A Historical Perspective*, 2009 Hum. Rts. Q. 31(1), 163, 208 f. See also AU, *Transitional Justice Policy,* 2019, para 35 ff.

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normative framework will concentrate on the former two sources. General principles of international law rarely receive detailed treatment in international jurisprudence and scholarship, so that the rules pertaining to their interpretation are all but clear. Furthermore, their role in international law is to fill gaps and provide guidance for interpreting other sources, rather than being the focal point of analysis.[1026] As Lauterpacht put it: "the main function of 'general principles of law' has been that of a safety-valve to be kept in reserve rather than a source of law of frequent application."[1027]

The remaining two sources of the right to reparation – treaty law and customary international law – are, in essence, subject to the same rules of interpretation: Based on its text, the norm must be interpreted in light of its context, object, and purpose.[1028] Since the right to reparation has not received an authoritative written restatement, it is difficult to take its text as a basis for interpretation. Instead, formulations by different entities will substitute an official text. Since no single restatement is authoritative, the interpretation must rely on the restatements' common essence.[1029] There is no indication

1026 Bassiouni, *A Functional Approach to General Principles of International Law*, 1989 Michigan J. Intl. L. 11(3), 768, 775 ff., 791 ff.; Gaja, *General Principles of Law*, in: Wolfrum (ed.), *Max Planck Encyclopedia of International Law,* Online Edition 2013, para 21; ICJ*, Case Concerning the Right of Passage Over Indian Territory (Merits)*, I.C.J. Reports 1960, 6, 43.

1027 Lauterpacht, *The Development of International Law by the International Court*, 1958, 166.

1028 For treaty law see art. 31 VCLT. For customary international law see Bleckmann, *Zur Feststellung und Auslegung von Völkergewohnheitsrecht*, 1977 Heidelberg J. Intl. L. 37, 504, 525 ff.; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 2008, 496 ff.; Ammann, *On the Interpretability of Customary International Law – A Response to Nina Mileva and Marina Fortuna,* OpinioJuris, 2019; ICJ*, Fisheries Case (United Kingdom v. Norway) - Seperate Opinion of Judge Hsu Mo*, I.C.J. Reports 1951, 42, 42 f.; ICJ*, North Sea Continental Shelf Case - Dissenting Opinion of Judge Tanaka*, I.C.J. Reports 1969, 172, 182; Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration - Normative Shadows in Plato's Cave*, 2015, 264 ff.; Merkouris, *Interpreting the Customary Rules on Interpretation*, 2017 Intl. Commun. L. Rev. 19(1), 126, 139 ff. For the opposing position and rebuttals of their main arguments see 137 f. The ILC is at least open to deductive approaches to customary international law, ILC, *Commentary on the Identification of Customary International Law*, A/73/10, concl. 2, para 5.

1029 For that, these restatements need not necessarily have the same wording, Bleckmann, *Zur Feststellung und Auslegung von Völkergewohnheitsrecht*, 524 f., 526; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 496 f.; Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*, 264 f. Similarly, Ammann, *On the Interpretability of Customary International,* OpinioJuris, 2019.

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that the treaty-based and customary right to reparation differ decisively in scope.[1030] Consequently, this chapter will not distinguish between the two.

I. Object and Purpose: The Transformative Goal of Reparation

Interpretation must consider the object and purpose of a norm and the body of law it pertains to.[1031] This means of interpretation is closely connected to the principle of effectiveness, which favors an interpretation that effectively fulfills the object and purpose of a norm and its body of law.[1032] The principle plays a dominant role in the interpretation of human rights.[1033]

1030 This probably places the right to reparation into the category of multi-sourced equivalent norms (MENS). While experience with MENS shows that the norms are rarely fully congruent, the differences might not make much practical difference. In the following what has been termed a "cumulative approach" will be employed, treating the different norms as cumulatively applicable. For details see Broude/Shany, *The International Law and Policy of Multi-Sourced Equivalent Norms*, in: Broude/Shany (eds.), *Multi-Sourced Equivalent Norms in International Law,* 2011, 1, 8 f., 13 f. ; Michaels/Pauwelyn, *Conflict of Norms or Conflict of Laws - Different Techniques in the Fragmentation of Public International Law*, 2011 Duke J. Comp. & Intl. L. 22(3), 349, 372 ff.

1031 Art 31(1) VCLT; Dörr, *Article 31 - General Rule of Interpretation*, in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties - A Commentary,* 2nd Edition 2018, 559, para 53; Gardiner, *Treaty Interpretation*, 2nd Edition 2015, 220 f.; Bleckmann, *Zur Feststellung und Auslegung von Völkergewohnheitsrecht*, 528; Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, 498 f.; Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*, 264 ff.; ICJ, *North Sea Continental Shelf Case - Dissenting Opinion of Judge Tanaka*, 181.

1032 Fitzmaurice, *Law and Procedure of the International Court of Justice - Treaty Interpretation and Certain Other Treaty Points*, 1951 Brit. Y.B. Intl. L. 28, 18 f.; Gardiner, *Treaty Interpretation*, 221 f.; Dörr, *Art. 31*, para 52; PCIJ*, The Mavrommatis Palestine Concessions Case (Greece v. The United Kingdom)*, P.C.I.J. (ser. B) No. 3, 1924, 7, 34; ICJ*, Corfu Channel*, 24.

1033 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 428; ECtHR*, Stoll v. Switzerland*, 69698/01 (GC), 2007, para 128; IACtHR*, Advisory Opnion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, OC-16/99, 1999, para 58; Rietiker, *The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights - Its Different Dimensions and its Consistency With Public International Law: No Need for the Concept of Treaty Sui Generis*, 2010 Nordic J. Hum. Rts. 79(2), 245, 255 ff.; Jayawickrama, *The Judicial Application of Human Rights Law*, 2nd Edition 2017, 161.

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Primarily, the right to reparation aims to provide corrective justice, that is, to erase the harm the survivor suffered as far as possible.[1034] In that context, the principle of effectiveness invites a pragmatic approach to interpretation, allowing the delivery of meaningful reparation in the demanding transitional justice environment.[1035] Chapter three evinced that reparation in transitional justice also serves transitional justice's transformative aim. Hence, strengthening respect for human rights and generalized trust must be considered a further object and purpose of reparation in transitional justice. As shown above, interpretation must seek to optimize the realization of both goals as far as possible.[1036]

II. Normative Environment

Transitional justice reparation programs have more notable effects on other rights and interests than individual reparation awards. Partially, this is intended in light of reparation programs' transformative aim. Other effects are simply a result of the programs' much larger scale. Whatever the reason, one must consider the effects of an interpretation of the international law on reparation on other rights and interests – which in sum can be termed the normative environment of the international law on reparation.[1037]

1. Systemic Integration

The principle of systemic integration encapsulates consideration of a norm's environment. It demands that the interpreter considers how the interpreta-

1034 Commonly accepted secondary purposes of reparation are also the condemnation of the violation, retribution and deterrence Shelton, *Remedies in International Human Rights Law*, 19 ff.

1035 Similarly, IAComHR, *Compendium,* OEA/Ser.L/V/II.Doc. 121, para 169.

1036 See above, ch. 3, B.II.

1037 Fitzmaurice, *Law and Procedure of the ICJ*, 18; Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4 - Treaty Interpretation and Other Treaty Points*, 1957 Brit. Y.B. Intl. L. 33, 203, 220; ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 413; McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 2005 Intl. Comp. L. Q. 54(2), 279; Pauwelyn, *Conflict of Norms in Public International Law*, 247, 253 f.; Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration*, 266 f.

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tion of one norm affects the operation of other norms.[1038] The principle is embodied both in Art. 31(1) VCLT, speaking of the context of a norm, and Art. 31(1)(c) VCLT, referring to norms outside of the treaty under consideration. It plays a prominent role in human rights interpretation.[1039] Behind the principle of systemic integration lies the basic assumption that international law forms a system in which normative conflict should be avoided.[1040] Therefore, separate provisions should be treated as "aspects of an overall aggregate of the rights and obligations of states."[1041] Since this requires establishing a shared systemic objective behind a set of rules and prioritizing concerns in that light, systemic integration is bound up closely with teleological interpretation.[1042]

2. Resolving Normative Conflict

Considering the context of a human rights norm often gives rise to the problem of normative conflict. Narrowly defined, conflict means incompatibility: following one norm necessarily leads to a breach of another norm.[1043] Such situations call for conflict resolution rules, which prioritize one norm over the other, such as rules of hierarchy, lex posterior, lex specialis, etc.[1044] In most circumstances, such rules do not apply to competing human rights. While several propositions for a hierarchy between human rights exist, the predominant approach upholds their indivisibility and consequently rejects any notion of hierarchy.[1045] The ius cogens nature of some human rights

1038 ICJ, *Dispute Regarding Navigational and Relational Rights (Costa Rica v. Nicaragua)*, I.C.J. Reports 2009, 213, para 77 ff.; ECtHR, *Klass and Others v. Germany*, 5029/71 (Plenary), 1978, para 68.

1039 Corten, *The Vienna Conventions on the Law of Treaties - Vol. I*, 2011, art. 31 para 41; ECtHR, *Saadi v. The United Kingdom*, 13229/03 (GC), 2008, para 62.

1040 Corten, *VCLT - Vol. I*, art. 31 para 41; McLachlan, *The Principle of Systemic Integration*, 318; ECtHR, *Saadi v. The United Kingdom*, 13229/03, para 62.

1041 ILC, *Report of the International Law Commissions - Fifty-Seventh Session (2 May - 3 June and 11 July - 5 August 2005),* A/60/10, 2005, para 467.

1042 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 412, 419.

1043 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 24; Pauwelyn, *Conflict of Norms in Public International Law*, 175 f. The author also gives an overview over other definitions, 166 ff.

1044 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 412; Milanovic, *Norm Conflict in International Law - Whither Human Rights*, 2009 Duke J. Comp. Intl. L. 20(1), 69, 73.

1045 de Schutter/Tulkens, *Rights in Conflict - The European Court of Human Rights as a Pragmatic Institution*, in: Brems (ed.), *Conflicts Between Fundamental Rights,* 2008,

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provides the only generally accepted exception to that stance. Since the boundaries of that category are intensely disputed, it has not had much practical effect.[1046] The right to reparation does not have ius cogens status. Even if it redeems the violation of a primary ius cogens norm, that primary norm's status does not extend to the secondary norm. Given that the right to reparation has its independent basis in the right to an effective remedy, the violation that gave rise to it is not its source but rather a condition of applicability.[1047] Put differently, if the right to reparation arises from the violation of a ius cogens obligation, it does not share its ius cogens status.[1048] Solving normative conflict between the right to reparation and other human rights based on an a priori hierarchy will thus rarely be possible. Lex specialis or lex posterior rules are of limited help, too, as different human rights are

169, 179 ff.; Cariolou, *The Search for an Equilibrium by the European Court of Human Rights*, in: Brems (ed.), *Conflicts Between Fundamental Rights,* 2008, 249, 259 ff.; Donnelly/Whelan, *International Human Rights*, 5th Edition 2018, 68 ff.; de Schutter, *International Human Rights Law - Cases, Materials, Commentary*, 2010, 446 f.; Meron, *On a Hierarchy of International Human Rights*, 1986 Am. J. Intl. L. 80(1), 1; Koji, *Emerging Hierarchy in International Human Rights and Beyond - From the Perspective of Non-Derogable Rights*, 2001 Eur. J. Intl. L. 12(5), 917; ICC, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeals Against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for Which Thomas Lubanga Dyilo is Liable - Separate Opinion of Judge Luz del Carmen Ibáñez Carranza,* ICC-01/04-01/06-3466-AnxII (AC), 2019, para 71 ff.; van Boven, *Categories of Rights*, in: Moeckli et al. (eds.), *International Human Rights Law,* 2nd Edition 2014, 143, 147 ff. While van Boven stipulates a hierarchy in the sense that some human rights are "more fundamental or basic", it is doubtful that that leads him to a lexical priority of those rights over others in all circumstances. Further problems with the notion of hierarchy are summarized by Arosemena, *Conflicts of Rights in International Human Rights - A Meta-Rule Analysis*, 2013 Global Constitutionalism 2(1), 6, 15 ff., 31 f.

1046 Bianchi, *Human Rights and the Magic of Jus Cogens*, 2008 Eur. J. Intl. L. 19(3), 491, 499 ff.; Meron, *On a Hierarchy of International Human Rights*, 14 ff.; de Schutter, *International Human Rights Law*, 64 ff.; de Wet, *Jus Cogens and Obligations Erga Omnes*, in: Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, 541; Shelton, *Normative Hierarchy in International Law*, 2006 Am. J. Intl. L. 100(2), 291, 279 ff.; Milanovic, *Norm Conflict in International Law*, 71 f.

1047 Even if that were otherwise, Waldron convincingly argued that different obligations flowing from the same right can have different statuses, Waldron, *Rights in Conflict*, 1989 Ethics 99(3), 503, 515. On the relationship between the rights to a reparation and the right to an effective remedy see above, ch. 1, A.I.

1048 ILC, *ASR Commentaries*, A/56/10, art. 55 para 2. To the knowledge of the author, there is no international practice suggesting that the right to reparation is of a ius cogens nature, if the primary obligation violated is of ius cogens nature.

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complementary rather than in a specialty relationship, and later created rights were not intended to abrogate earlier rights.[1049]

Instead, as in general international law, genuine normative conflicts should be avoided as far as possible through harmonizing interpretation.[1050] Then, not incompatibility, but a conflict of norms in a broader sense exists. Different norms might frustrate each other's objectives because they apply to the same situation but pursue different aims. Such is often the case when the law on immunity and human rights law apply to the same situation.[1051] In human rights law, such conflicts in the broader sense are resolved on two levels. First, the scope of protection a right offers is interpreted in a way to avoid normative conflict.[1052] This technique can only be examined in light of concrete situations. It will therefore receive further treatment below, where pertinent. Second, normative conflict is resolved by way of restricting a right for a legitimate aim.

a. Limiting the Right to Reparation

This technique is without problems for so-called two-stage rights, which expressly lay down conditions under which they can be limited.[1053] Neither the right to reparation nor the right to an effective remedy does the interpreter this favor. Still, the right to reparation can be restricted. The ACHR and

1049 For the role of party intent in the application of the lex posterior maxim see, ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 229 f., 243, 272. For the special difficulties in norm regimes erected by successive multilateral treaties, para 235.

1050 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 37 ff.; Pauwelyn, *Conflict of Norms in Public International Law*, 240 f.; Milanovic, *Norm Conflict in International Law*, 73; ECtHR, *N.D. and N.T. v. Spain*, 8675/15 (Grand Chamber), 2020, para 172.

1051 ILC, *Report on Fragmentation of International Law*, A/CN.4/L.682, para 24 f.

1052 This technique is used especially for rights considered "absolute", that is, not subject to restrictions, Sottiaux, *Terrorism and the Limitation of Rights - The ECHR and the US Constitution*, 2008, 40 f., 47 f.; Battjes, *In Search of a Fair Balance - The Absolute Character of the Prohibition of Refoulement Under Article 3 ECHR Reassessed*, 2009 Leiden J. Intl. L. 22(3), 583, 595 ff., 614 ff., 620 f.; Addo/Grief, *Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?*, 1998 Eur. J. Intl. L. 9(3), 510, 522 f.; van der Schyff, *Cutting to the Core of Conflicting Rights - The Question of Inalienable Cores in Comparative Perspective*, in: Brems (ed.), *Conflicts Between Fundamental Rights,* 2008, 131, 139.

1053 van der Schyff, *Cutting to the Core of Conflicting Rights*, 139 ff.

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the African Convention on Human and Peoples' Rights (ACHPR) contain general limitation clauses applicable to all rights.[1054] While the ECHR and the ICCPR lack such a clause, the ECtHR and the HRC held that the right to an effective remedy is subject to implied limitations.[1055] By extension, these should apply to the right to reparation as part of the right to an effective remedy.[1056] The opposite view would be implausible. Disallowing restrictions means that the respective right cannot be lawfully interfered with.[1057] It trumps other rights in case of conflict. Only the most fundamental human rights, such as the prohibition of torture, are firmly placed in that category of absolute rights.[1058] The right to reparation does not protect equally important values, which would justify putting it above all other possible interests. Accordingly, it can be derogated from in situations of emergency.[1059] Other indicators of absolute rights – such as a rigorous duty to investigate – are absent in the case of the right to reparation.[1060] Considering that

1054 Art. 32(2) ACHR contains a general clause according to which "[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society." This provision is applicable especially to rights, whose legitimate restrictions are not specified, IACtHR, *Advisory Opinion on the Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, OC-5/85, 1985, para 65. Similarly, ch. II of the ACHPR contains duties, which serve as a limitation of every right. Esp. art. 27(2) ACHR demands that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

1055 ECtHR, *Kudla v. Poland*, 30210/96 (Grand Chamber), 2000, para 151 f.; HRCom, *Sechremelis et al v. Greece*, CCPR/C/100/D/1507/2006/Rev.1, 1507/2006, 2011, para 10.4 f.

1056 The ECtHR held that implied limitations are especially pertinent, if the right is not mentioned expressly in the convention, ECtHR, *Golder v. The United Kingdom*, 4451/70 (Plenary), 1975, para 38.

1057 Gewirth, *Are There any Absolute Rights?*, 1981 Phil. Q. 31(122), 1, 2; Addo/Grief, *Does Article 3 ECHR Enshrine Absolute Rights?*, 516.

1058 Even the few rights considered absolute are interpreted in a way that they can accommodate proportionate restrictions with a view to other competing rights and interests, Sottiaux, *Terrorism and the Limitation of Rights* 40 f., 47 f.; Battjes, *In Search of a Fair Balance*, 595 ff., 614 ff., 620 f.; Addo/Grief, *Does Article 3 ECHR Enshrine Absolute Rights?*, 516, 522 f.; van der Schyff, *Cutting to the Core of Conflicting Rights*, 139.

1059 It still holds true as argued above, A.II., that such a derogation will rarely be necessary. For non-derogability being a necessary condition to consider a right absolute, Mavronicola, *What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights*, 2012 Hum. Rts. L. Rev. 12(4), 723, 729 ff.

1060 cf. Addo/Grief, *Does Article 3 ECHR Enshrine Absolute Rights?*, 516.

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reparation does not protect paramount values but can touch other vital interests, allowing to limit reparation better serves the effective protection of all human rights.[1061]

Human rights bodies unanimously hold that where restrictions are allowed, they must pursue a legitimate aim, be necessary and proportionate.[1062] A restriction is necessary if no other equally effective means to reach the legitimate aim exists.[1063] It is proportionate if a fair balance between the opposing rights and interests is struck. [1064]

For the most part, the necessity requirement can be judged only in light of concrete situations and possible alternative courses of action. It will thus be discussed below in relation to concrete problems. It has one crucial general consequence, though. States cannot simply assume the existence of a conflict. Before sacrificing part of the protection a right offers for the sake of other legitimate aims, the state must evaluate whether the conflict can be avoided.

1061 Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, in: de Feyter et al. (eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations,* 2005, 345, 452 f.

1062 ECtHR, *Ashingdane v. The United Kingdom*, 8225/78 (Chamber), 1985, para 57; ECtHR, *A. v. The United Kingdom*, 35373/97 (Second Section), 2002, para 74 ff.; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 6; IACtHR, *Kimel v Argentina (Merits, Reparations and Costs)*, 2008, para 54, 81; IACtHR, *Claude-Reyes et al. v. Chile (Merits, Reparations and Costs)*, 2006, para 90 ff.; IACtHR, *Advisory Opinion OC-5/85*, OC-5/85, para 46, 67; AComHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, 276/2003, 2010, para 214; AComHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03-296/05, 2009, para 188; Ducoulombier, *Conflicts Between Fundamental Rights and the European Court of Human Rights - An Overview*, in: Brems (ed.), *Conflicts Between Fundamental Rights,* 2008, 217, 228; Khosla, *Proportionality - An Assault on Human Rights? A Reply*, 2010 Intl. J. Const. L. 8(2), 298, 299 f.; Mac-Gregor/Möller, *Artículo 32*, in: Steiner/Uribe (eds.), *Convención Americana Sobre Derechos Humanos - Comentario,* 2014, 722, 732 f.

1063 IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, 2007, para 93; HRCom, *General Comment No. 34 - Article 19: Freedoms of Opinion and Expression,* CCPR/C/GC/34, 2011, para 34; HRCom, *General Comment No. 27 - Article 12 (Freedom of Movement),* CCPR/C/21/Rev.1/Add.9, 1999, para 14; CESCR, *General Comment No. 14 - The Right to the Highest Attainable Standard of Health,* E/C.12/2000/4, 2000, para 29; AComHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, 294/04, 2009, para 176; Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 2013 Intl. J. Const. L. 11(2), 466, 481 ff.

1064 IACtHR, *Kimel v Argentina (Merits, Reparations and Costs)*, para 54, 84; ECtHR, *Jahn and Others v. Germany*, 46720/99 (Grand Chamber), 2005, para 93; Ducoulombier, *Conflicts Between Fundamental Rights*, 228 f.; Khosla, *Proportionality*, 299 f.

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If the state can dissolve the conflict by changing background circumstances, infringing one right to safeguard another is unnecessary.[1065]

b. The Role of Balancing

The balancing exercise that determines the proportionality of a restriction is the core of resolving normative conflicts in human rights law. It also is subject to intense criticism. The most pertinent one is that balancing is little more than a metaphor, whose lack of guiding principles opens the door for judicial arbitrariness.[1066] In the search for a remedy to that problem, scholars have resorted to practical concordance doctrine, stemming originally from German constitutional law.[1067] While it has not found explicit application in international human rights jurisprudence, some judges of international tribunals at least allude to the idea in their writings and individual opinions.[1068] The author chooses to rely on it because it is a highly compelling method.[1069] It introduces principles, which concretize the unqualified balancing metaphor to the degree that it becomes more than an opening for arbitrary, subjective standards. It also operationalizes the idea that no hierarchy between rights exists and all merit as full a protection as possible.[1070]

1065 de Schutter/Tulkens, *Rights in Conflict*, 206 ff.

1066 de Schutter/Tulkens, *Rights in Conflict*, 191 f., 197; Cariolou, *The Search for an Equilibrium by the ECtHR*, 266 f.; Arosemena, *Conflicts of Rights in International Human Rights*, 19 f., 32 f.; Habermas, *Between Facts and Norms - Contributions to a Discourse Theory of Law and Democracy*, 1997, 253 ff., specifically 259 stating that "because there are no rational standards for [bringing values into a transitive order], weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies."

1067 Hailbronner/Martini, *The German Federal Constitutional Court*, in: Jakab et al. (eds.), *Comparative Constitutional Reasoning*, 2017, 356, 373.

1068 ECtHR, *Fretté v. France - Joint Partly Dissenting Opinion of Judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens*, 36515/97, 2002; de Schutter/Tulkens, *Rights in Conflict*, 203.

1069 Admittedly, that the author received a German legal education might explain just as well as the actual merits of the theory why he thinks of practical concordance as a compelling method. However, the former is a scientifically much more dubious reason to choose a theory and, hence, acknowledged but banished to the footnotes.

1070 Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2005 Hum. Rts. Q. 27(1), 294, 303.

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Practical concordance requires striking a balance between competing rights and/or interests, giving maximal effect to them all.[1071] Alexy developed one of the most elaborate operationalizations of that idea. According to him, balancing is a three-step procedure. When right A is restricted to safeguard another right B, one must first establish the detriment caused to a right A – that is, the *interference* with right A. Interference can result from a limited fulfillment of a right's positive dimension (non-satisfaction) or a failure to respect its negative dimension. Second, one must establish the *importance* of the competing right B – the degree of interference if, hypothetically, right A would not be interfered with. In the third step, one must weigh the importance of right B against the interference with right A.[1072] Alexy enables this last step with his "Weight Formula". It determines each competing right's weight with three factors: Each right's abstract weight, concrete importance[1073], and the probability with which the interference materializes.

Although human rights are indivisible and non-hierarchical, different rights have different abstract weights, determined by the values they protect and their overall importance for the human rights system.[1074] In case the competing rights have the same abstract weight, the factor becomes

1071 Marauhn/Ruppel, *Balancing Conflicting Human Rights - Konrad Hesse's Notion of "Praktische Konkordanz" and the German Federal Constitutional Court*, in: Brems (ed.), *Conflicts Between Fundamental Rights,* 2008, 273, 179 ff.; de Schutter/Tulkens, *Rights in Conflict*, 203 ff.; Arosemena, *Conflicts of Rights in International Human Rights*, 20 ff.; For an overview of similar "maximization accounts of balancing" and the most relevant critique see Urbina, *A Critique of Proportionality and Balancing*, 2017, ch. 2-3. For a similar theoretical issue see above ch. 3, B.II.

1072 Alexy, *On Balancing and Subsumption - A Structural Comparison*, 2003 Ratio Juris 16(4), 433, 436 f.

1073 Alexy uses the terms "degrees of interference" for right A and "concrete importance" for right B. For reasons of simplicity, both will be referred to as "concrete importance" in the following.

1074 cf. Alexy, *On Balancing and Subsumption*, 440. See for example the right to life, which the AComHPR describes as "the fulcrum of all other rights" and "foundational", AComHPR, *General Comment No. 3 on the African Charter on Human and Peoples' Rights - The Right to Life (Article 4)*, 2015, para 1, 5. The IACtHR emphasizes "the fundamental role the Convention assigns to this right", IACtHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, 2006, para 151. The ECtHR ranks the right to life "as one of the most fundamental provisions in the Convention", ECtHR, *McCann and Others v. United Kingdom*, 18984/91, 1995, para 147; ECtHR, *Giuliani and Gaggio v. Italy,* 23458/02, 2011, para 174 ff.; ECtHR, *Karatas v. Turkey - Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka*, 23168/94, 1999.

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irrelevant.[1075] As a secondary right, the right to reparation will not have the same abstract weight as absolute rights, e.g., the right to be free from torture. It also has less abstract weight than rights protecting fundamental individual positions, such as the right to life. The right to reparation's abstract weight is probably similar to other secondary rights, such as prosecution and investigation. [1076]

The concrete importance of the rights in conflict depends on the degree of interference. Since right B is not actually interfered with, its concrete importance is determined by considering the degree of interference if, hypothetically, right A would not be interfered with.[1077]

Lastly, determining the concrete importance of both rights rests on assumptions because it relies on hypothetical scenarios of interference and non-interference. Hence, the probability with which these scenarios materialize must be considered. The less likely a scenario of interference is, the lower is the weight attached to it in the balancing exercise. [1078]

From these three factors on each side of the equation arises the Weight Formula:

$$W_{A,B} = \frac{I_A \times W_A \times R_A}{I_B \times W_B \times R_B}$$

Where I_A is the abstract weight of right A, I_B the abstract weight of right B, W_A, and W_B the concrete importance of right A and B respectively, and R_A and R_B the probability with which the interferences with both rights materialize. The result, $W_{A,B}$, is the concrete weight of right A under the circumstances of the case under consideration.[1079]

1075 Alexy, *On Balancing and Subsumption*, 440. Assigning abstract weights to rights does not create a hierarchy understood as a lexical order of rights, one taking precedence over the other. The abstract weight of a right stems from positions it protects, which can be weightier or less weighty. Its high abstract weight is a factor to be taken into account when assessing the situation at hand. The concrete importance and the probability assessment can still tilt the scales in favor of the right with less abstract weight.

1076 Even though these might stem from fundamental or absolute rights, Waldron showed that different obligations arising from the same right need not have the same abstract weight, Waldron, *Rights in Conflict*, 515.

1077 Alexy, *On Balancing and Subsumption*, 441.

1078 Alexy, *On Balancing and Subsumption*, 446 f.

1079 Alexy, *On Balancing and Subsumption*, 440 ff., 446.

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To enable the insertion of values into the formula, Alexy introduces a triadic scale. A cardinal scale cannot be employed since interferences with rights rarely lend themselves to concrete quantification. Instead, Alexy proposes an ordinal scale with three values: l, m, and s.[1080] It is possible to determine whether any given interference is light (l), moderate (m), or serious (s), whether the abstract weight is light (l), medium (m), or strong (s), and whether the probability of the scenarios is low (l), medium (m), or strong (s). Numbers can represent l, m, and s, e.g., 1, 2, and 4 for abstract weight and concrete importance and 1, ½, and ¼ for reliability. If the subsequent calculation results in a value higher than 1, balancing weights in favor of right A. If it is below 1, B comes out on top.[1081] Suppose a state forbids a newspaper to publish the name of an undercover agent in a prominent criminal case because there is a slim chance that the suspects might kill the agent.[1082] Here, the right to freedom of the press conflicts with the right to life. The abstract weight of the right to life is high, whereas the freedom of the right to press shall be defined to be of a medium weight.[1083] The concrete importance of the right to life is again high because the purported interference would result in its complete negation, death. It will be assumed that freedom of the press enjoys high concrete importance. The criminal case might be of public interest, and the undercover agent's name relevant because of their known unreliability.[1084] The weight formula for this case would yield the following result, with the upper part of the formula representing the agent's right to life and the lower part of the formula representing the freedom of the press:

$$0{,}5 = \frac{4 \times 4 \times 1/4}{2 \times 4 \times 1}$$

1080 On the differences and usages of cardinal and ordinal scales see Peterson, *An Introduction to Decision Theory*, 2nd Edition 2017, 24 ff., 297 ff. On the impossibility of a cardinal scale in the present context see Alexy, *Die Gewichtsformel*, in: Jickeli et al. (eds.), *Gedächtnisschrift für Jürgen Sonnenschein,* 2003, 771, 783.

1081 Alexy, *On Balancing and Subsumption*, 440 ff., 444 ff. A slightly finer scale – e.g. a six-step or nine-step model – could also be used. Beyond that, classification becomes increasingly difficult, 440, 443 f.

1082 To keep the example simple, it is assumed that the unlikeliness of the agent being killed is established. Also, only the detriment to the right to life will be considered, not any state interests in continuing the investigation. One could assume, e.g. that the agent already secured all the evidence needed.

1083 This abstract weight is of course debatable. It is assumed here for the sake of argument.

1084 Naturally, a real assessment of the right's concrete importance would need to rely on much more information.

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Thus, even though the right to life has a higher abstract weight than freedom of the press (4 vs. 2) and the concrete importance of the two cancel each other out (4 vs. 4), freedom of the press prevails because of its certain infringement in contrast to the agent's unlikely death (1 vs. 1/4). An outcome below 1 (0,5) reflects that result.

c. Inviolable Cores?

The Weight Formula also allows addressing the notion of inviolable cores of human rights. Such a core is sometimes said not to be subject to balancing.[1085] Yet, what constitutes the core of a right must be assessed in relation to the right's context. Law cannot demand the impossible from the state. Abstractly defining impenetrable boundaries risks being deaf to exceptional circumstances.[1086] Also, since human rights operate in a system, it risks elevating a right's core above all other interests, which in the situation at hand might be weightier. For that reason, a right's inviolable core is better conceived of as the product of a balancing exercise than a limit on it. Interference with a core of a right should be conceived as very strong, giving the right in question a very high concrete importance – up until the point at which it is almost impossible to justify the interference under normal circumstances.[1087]

d. Summary

In sum, normative conflicts between human rights and between human rights and state interests can be resolved by interpreting their scope with regard to potentially conflicting norms and restricting them. Restrictions must pursue

1085 ECtHR, *Ashingdane v. The United Kingdom*, 8225/78, para 57; *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1985 Hum. Rts. Q. 7(1), 3, 4, principle I.A.2.

1086 See below for examples, E.II.4.c.bb.

1087 van der Schyff, *Cutting to the Core of Conflicting Rights*, 133 ff.; Klatt/Meister, *Proportionality - A Benefit to Human Rights? Remarks on the I·CON Controversy*, 2012 Intl. J. Const. L. 10(3), 687, 691 f.; Brems, *Conflicting Human Rights*, 303 f.; Alexy, *Constitutional Rights, Balancing, and Rationality*, 2003 Ratio Juris 16(2), 131, 139 f.; An application of this principle can be seen in ECtHR, *A. v. The United Kingdom*, 35373/97, para 78.

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a legitimate aim, be necessary and – most importantly – strike a fair balance between all rights and interests involved. While the last step is criticized as arbitrary, it remains the approach taken by human rights practice.[1088] The practical concordance doctrine, operationalized by Alexy's Weight Formula, can somewhat mitigate the arbitrariness of balancing. What factors into the balancing exercise can only be determined concerning concrete situations.[1089] Therefore, the technique will be concretized below in relation to concrete challenges of reparation programs.

III. Discretion and Deference

A last methodological point pertains to the law's limits in the complex transitional situation. Reparation in transitional justice operates in highly complex, politically sensitive environments. Implementing the right to reparation is contingent on many factors, including the history, culture, norms, practices, and traditions at play. It is therefore commonplace to demand that reparation be context-sensitive. Much speaks to the fact that otherwise, it will lose its effectiveness.[1090] As argued before, a normative framework for reparation in transitional justice must therefore leave states enough flexibility to tailor reparation to the situation at hand.[1091] This flexibility is not alien to international human rights law. Arguably, it constitutes a "structural principle" of the field.[1092] The convoluted discussion unfolding around keywords such as subsidiarity, deference, discretion, the margin of

1088 ECtHR, *Hatton and Others v. The United Kingdom*, 36022/97 (Grand Chamber), 2003, para 98, 125; IACtHR, *Fontevecchia y D'Amico v. Argentina*, 2011, para 50; HRCom, *Siobhán Whelan v. Ireland*, CCPR/C/119/D/2425/2014, 2425/2014, 2017, para 7.9; AComHPR, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Republic of Zimbabwe*, 284/03, 2003, para 176.

1089 Some relevant factors are listed e.g. by Brems, *Conflicting Human Rights*, 303 ff.

1090 UN Secretary General, *The Rule of Law and Transitional Justice*, S/2004/616, 1; Duthie, *Introduction*, 29; Waldorf, *Institutional Gardening in Unsettled Times - Transitional Justice and Institutional Contexts*, in: Duthie/Seils (eds.), *Justice Mosaics - How Context Shapes Transitional Justice in Fractured Societies,* 2017, 40, 61; Vinjamuri/Snyder, *Law and Politics in Transitional Justice*, 2015 Ann. Rev. Pol. Sci. 18, 303, 320; Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice*, 208 f.

1091 Kress/Grover, *International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character*, in: Bergsmo/Kalmanovitz (eds.), *Law in Peace Negotiations,* 2009, 29, 32.

1092 Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 2003 Am. J. Intl. L. 97(1), 38, 56 ff.

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appreciation, and many others is far outside the present study's scope. A few clarifying remarks without any claim to comprehensiveness shall still serve to sustain attention to the issue.

To a degree, there is inherent flexibility to the implementation of human rights. Human rights are abstract principles, which rarely regulate any specific situation in detail. They must be specified to apply to concrete situations. This automatically gives the actor implementing human rights – usually states – some flexibility. There are usually several equivalent options for specification – or at least options about whose equivalency there can be reasonable disagreement.[1093] The right to reparation is no exception to that rule. Its basic premise of full reparation and the different forms of reparation remain abstract and must be specified to the situation at hand.[1094] This form of flexibility is necessary and therefore uncontroversial. It can be advantageous for human rights protection because it allows human rights to cover and be effective under wildly different circumstances.[1095]

A different question is the level of scrutiny international institutions should employ when reviewing how states used their inherent discretion in implementing human rights. International jurisprudence differs whether and to what degree it should defer to states' choices in implementing human rights. While deference plays a vital role in the ECtHR's jurisprudence[1096], other international bodies are less enthusiastic about the idea. Some only hesitantly grant a margin of appreciation. Others reject it.[1097] This heterogeneity also

1093 Besson, *Subsidiarity in International Human Rights Law - What is Subsidiary About Human Rights?*, 2016 Am. J. Juris. 61(1), 69, 84; Etinson, *Human Rights, Claimability and the Uses of Abstraction*, 2013 Utilitas 25(4), 463, 480, 485 ff.; Letsas, *The Margin of Appreciation Revisited - A Response to Follesdal*, in: Etinson (ed.), *Human Rights - Moral or Political?,* 2018, 294, 296 ff.; Follesdal, *Appreciating the Margin of Appreciation*, in: Etinson (ed.), *Human Rights - Moral or Political?,* 2018, 269, 277 f.; Çalı, *Specialized Rules of Treaty Interpretation - Human Rights*, in: Hollis (ed.), *The Oxford Guide to Treaties,* 2012, 525, 531.

1094 Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, 451 f., 455.

1095 Etinson, *Human Rights, Claimability and the Uses of Abstraction*, 485 ff.

1096 Spielmann, *Allowing the Right Margin - The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 2017 Cambridge Y.B. Eur. L. Stud. 14, 381, 386 ff. For an analysis on colonial aspects of the doctrine in its connections to the state of emergency see Reynolds, *Empire, Emergency and International Law*, 170.

1097 The doctrine was used e.g. bei the IACtHR, the AComHPR and the CESCR, Contreras, *National Discretion and International Deference in the Restriction of Human Rights - A Comparison Between the Jurisprudence of the European and the Inter-*

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extends to the deference paid to states in the choice between remedial measures.[1098] There is some evidence that international bodies pay greater deference to states' choices in the implementation of reparation for systematic human rights violations.[1099] Much speaks in favor of that approach. The right to reparation is an obligation of result. That states achieve the demanded result is more important than the way they achieve it. The right itself remains abstract and, therefore, often provides little guidance for states in concrete situations. To then subject their actions to close scrutiny would place a heavy burden on them. This holds especially true in transitional contexts, which require complicated choices contingent on many political, societal, economic, and other factors. States are often in a better position to assess and evaluate these factors than supervisory bodies.[1100] As will be further elaborated below, international or national supervisory bodies might not even have the epistemic abilities to assess a state's choice fully.[1101]

Thus, there are good arguments for paying deference to states' decisions regarding transitional justice reparation programs. International standards for domestic reparation programs in transitional justice should consequently not over-determine states' obligations to truly leave them the flexibility needed to devise context-specific and therefore effective reparation measures.

American Court of Human Rights, 2012 Nw. J. Intl. Hum. Rts. 11(1), 28, 57 ff.; AComHPR, *Garreth Anver Prince v. South Africa*, 255/02, 2004, para 50 ff.; CESCR, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant,* E/C.12/2007/1, 2007, para 11. The HRC has expressed scpeticism, HRCom, *GC 34*, CCPR/C/GC/34, para 36.

1098 Besson, *Subsidiarity in International Human Rights Law*, 82 f.; Neumann, *Subsidiarity*, in: Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, 360, 371 ff.; ICJ, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, para 131; ICJ, *LaGrand (Germany v. United States of America)*, para 125.

1099 Sandoval, *Two Steps Forward, One Step Back*, 4, 7 f., 10 ff.; Oette, *Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations*, in: Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity - Systems in Place and Systems in the Making,* 2009, 217, 238; IACtHR, *Yarce et al v. Colombia*, 2016, para 326.

1100 This epistemological justification for deference is frequently raised in scholarship, see for example Besson, *Subsidiarity in International Human Rights Law*, 84; Letsas, *The Margin of Appreciation Revisited*, 303; Legg, *The Margin of Appreciation in International Human Rights Law - Deference and Proportionality*, 2012, 145 ff. Follesdal draws attention to the fact that this epistemic argument only applies to some factors that need to be assessed, Follesdal, *Appreciating the Margin of Appreciation*, 275 f.

1101 See below, G.I., II.2.

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IV. Summary: A Tripartite Approach

This section did not argue for a new, somehow transitional-justice-specific approach to interpretation. It raised specific points, which are of heightened importance for the subsequent analysis. The interpretation of the right to reparation in transitional justice should emphasize the object and purpose of reparation and the transitional justice considerations entering through that door. Due regard should be paid to pragmatic approaches that make reparation and human rights protection effective under the difficult circumstances of transitional justice. Interpretation should be approached holistically, considering other rights and interests affected by reparation programs. Wherever possible, these should be harmonized. If that proves impossible, one can resolve norm conflicts by proportionally restricting the right concerned and striking a balance between legitimate positions. Lastly, the nature of human rights as abstract principles, coupled with the heightened difficulties of implementing reparation programs in transitional justice situations, requires that states be allowed some discretion and deference when implementing reparation in transitional justice.

Backed by these methodological clarifications, the chapter will proceed by tackling the common differences identified in chapter two, which deviate from the international law on reparation. The chapter proceeds in loosely chronological order, starting with the law behind eligibility criteria for reparation programs (C.) and the intake procedure (D.), proceeding to various considerations related to the content of reparation programs (E.). It will then take up procedural and structural considerations (F. and G.) before finishing with the circumstances under which transitional justice reparation programs can end (H.).

C. Survivor Eligibility

A hallmark of successful reparation programs is their comprehensiveness, that is, that they cover as many survivors as possible.[1102] Yet, no program to date achieved or even attempted to achieve full comprehensiveness.[1103]

1102 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 26; IACtHR, *Yarce et al v. Colombia*, para 325.

1103 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 26.

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Restricting the eligibility for a reparation program to certain categories of survivors is the main bottleneck through which states try to limit the resources they must spend on reparation. That is no problem if excluded survivors have other means of obtaining redress. In Colombia, survivors who also perpetrated human rights violations (survivor-perpetrators) could not obtain benefits under the Victims Law but could seek redress through the ordinary justice system.[1104] As long as all mechanisms available to survivors adhere to international standards as elaborated in this chapter and the distinction does not lead to discriminatory treatment, this approach is acceptable, albeit not always recommendable. However, usually states restrict eligibility for reparations as such, effectively denying reparation to those outside of the scope of reparation programs. Most authors display little problem with that, simply assuming that it is necessary to do so.[1105] On a factual level, this position is intuitive. Times of systematic human rights violations see a plethora of violations committed – not only the prominent violations of bodily integrity but also less visible or "minor" violations, e.g., of freedom of expression. The field of violations becomes even broader if one considers economic, social, and cultural rights. Still, the passing-by legitimization of restricted eligibility does not do justice to this decision's fundamentality. It not only shapes the program's content and success.[1106] It also denies many survivors their rights. What is more, excluding certain groups of survivors from reparation programs can frustrate the object and purpose of reparation in transitional justice. Reparation is supposed to send the message that human rights are valid, applicable, enforceable, and important. Excluding certain groups of

1104 Tribunal Superior de Medellín, *Olimpo de Jesús Sánchez Caro y Otros, Sentencia*, 2015, 230 f.; Other states implemented successive reparation programs for different survivor groups, see for example Lira, *The Reparations Policy for Human Rights Violations in Chile*, in: de Greiff (ed.), *Handbook of Reparations,* 2006, 55, 95 ff.; Guembe, *Economic Reparations for Grave Human Rights Violations - The Argentinean Experience*, in: de Greiff (ed.), *Handbook of Reparations,* 2006, 21, 21 ff.

1105 HRC, *Report of the Special Rapporteur on Transitional Justice*, A/HRC/30/42, para 26; HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 78; OHCHR, *Reparation Programmes*, 18 ff.; Moffett, *Transitional Justice and Reparations - Remedying the Past?*, in: Lawther et al. (eds.), *Research Handbook on Transitional Justice,* 2017, 377, 383 ff.; Peté/du Plessis, *Reparations for Gross Human Rights Violations in Context*, in: Peté/Du Plessis (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses,* 2007, 3, 17; AComHPR, *Study on Transitional Justice in Africa*, 2019, para 55.

1106 Restrictions on eligibility often result in ignorance towards violations and phenomena not included, e.g. structural violence expressing itself in the violation of economic, social, and cultural rights.

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survivors from reparation undermines that message. It might even suggest that certain human rights violations are not condemned. While this does not provide sufficient reason to dismiss the possibility of excluding groups of survivors from reparation programs, it raises the demands for justifying such a policy.

The following sections scrutinize different types of restrictions on eligibility and their possible justifications, namely the restriction of eligibility to violations of certain rights (I.), the exclusion of certain persons (II.), and the imposition of cut-off-dates (III.). After analyzing these special justifications, the last section examines the general justifications that restrictions on eligibility are simply necessary because there are not enough resources to redress all survivors (IV.) and that state practice justifies restrictions (V.).

I. Excluding Rights

The most prevalent restriction of eligibility is that reparation programs repair violations of some rights only, usually the most fundamental civil and political rights protecting bodily integrity. Sierra Leone only redressed survivors of five types of violations of bodily integrity.[1107] Many other reparation programs placed similar limits on eligibility.[1108] No legally sound justification backs this

1107 These were amputees, severely war-wounded, survivors of sexualized violence, war widows and children, see above, ch. 2, B.IV.1.b.

1108 Guembe, *The Argentinean Experience*, 26 f., 30 ff., 34 ff., 43 ff.; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 95 ff.; Cammack, *Reparations in Malawi*, in: de Greiff (ed.), *Handbook of Reparations,* 2006, 215, 223, 224, 231; Cano/Ferreira, *The Reparations Program in Brazil*, in: de Greiff (ed.), *Handbook of Reparations,* 2006, 102, 102, 116, 138, 146; Houtte et al., *The United Nations Compensation Commission*, in: de Greiff (ed.), *Handbook of Reparations,* 2006, 321, 336 ff.; ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste - Between Reparations and Humanitarian Policymaking*, 2012, 17; Slyomovics, *Reparations in Morocco - The Symbolic Dirham*, in: Johnston/Slyomovics (eds.), *Waging War, Making Peace - Reparations and Human Rights,* 2009, 95, 105; ICTJ, *Transitional Justice in Morocco - A Progress Report*, 2005, 10, 11; Burt, *Transitional Justice in the Aftermath of Civil Conflict - Lessons from Peru, Guatemala and El Salvador*, 2018, 30; Martínez/Gómez, *A Promise to be Fulfilled - Reparations for Victims of the Armed Conflict in Guatemala*, 2019, 17; Sharma et al., *From Relief to Redress - Reparations in Post-Conflict Nepal*, 2019, 25, 38; Guillerot, *Reparations in Peru - 15 Years of Delivering Redress*, 2019, 17 f.; Congreso Nacional de Bolivia, Ley de Resarcimiento a Víctimas de la Violencia Politica, art. 4; Cámara de Diputados de Paraguay, Ley No. 838 que Indemniza a Victimas de Violaciones de Derechos Humanos Durante la Dictadura de 1954 a 1989, art. 1 f.; Asamblea General de Uruguay, Actuación Ilegítima del Estado

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practice – indeed, states usually do not provide any reason whatsoever for their choice of violations eligible for reparation.[1109]

This practice runs counter to the international law on reparation. The right to reparation attaches to the violation of any human right, which causes harm.[1110] The exclusion of certain violations creates hierarchies between survivors, can exacerbate tensions, and send the message that only some violations are worth redressing. This undermines the message that all and everyone's human rights are valid, applicable, enforceable, and important. The universality and object and purpose of the right to reparation thus prohibit excluding violations of certain rights from reparation programs. Accordingly, the IACtHR awarded reparation to survivors for violations for which a domestic reparation program did not provide redress.[1111]

II. Excluding Persons

Many reparation programs exclude certain persons. This happens mostly on two grounds: the person also perpetrated human rights violations (1.) or is an indirect survivor remotely connected to the direct survivor (2.).

Entre el 13 de Junio de 1968 y el 28 de Febrero de 1985 - Reconocimiento y Reparación a las Víctimas, art. 4 f.

1109 de Greiff, *DDR and Reparations - Establishing Links Between Peace and Justice Instruments*, in: Ambos/Wierda (eds.), *Building a Future on Peace and Justice,* 2009, 321, 338.

1110 In light of the debate about the justiciability of economic, social, and cultural rights, one could doubt whether survivors of violations of these rights have a right to reparation. However, that debate is now more or less settled. Indivisibility and lack of hierarchy between human rights prevail, making that position implausible. Therefore, the CESCR rightfully assumes that violations of economic, social and cultural rights give rise to an obligation to repair, which some reparation programs also attempted to discharge. For the stance of the CESCR see CESCR, *GC 14*, E/C.12/2000/4, para 59; CESCR, *Evaluation of the Obligation to Take Steps to the "Maximum Available Resources"*, E/C.12/2007/1, para 13(a). For a discussion of reparation programs, which arguably addressed violations of economic, social and cultural rights see, Arbour, *Economic and Social Justice for Societies in Transition*, 17 f.; Roht-Arriaza, *Reparations and Economic, Social and Cultural Rights*, in: Sharp (ed.), *Justice and Economic Violence in Transition,* 2014, 109, 121 ff. Generally on economic issues and transitional justice see Carranza, *Plunder and Pain*.

1111 IACtHR, *Omar Humberto Maldonado Vargas et al. v. Chile*, 2015, para 175; IACtHR, *Yarce et al. v. Colombia (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs)*, 2017, para 41.

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1. Survivor-Perpetrators

In most transitional contexts, individuals rarely fit neatly into the dual scheme of survivor or perpetrator. Instead, complicated biographies prevail, with people turning into both at different points.[1112] Such survivor-perpetrators can create a political problem.[1113] Survivors are often equated in public perception with innocence, in contrast to the "wicked" perpetrator.[1114] Granting reparation to survivor-perpetrators, who do not fit the public perception and putting them on an equal level with "deserving" ones, often causes political and social backlash.[1115] When the IACtHR ordered reparation for survivors of a brutally crushed prison riot in Peru, public outcry followed. The survivors were primarily members of the guerilla Sendero Luminoso[1116]. Accordingly, Peru's president vowed not to pay them a single Sol, and the monument that was supposed to honor those killed was vandalized.[1117] To avoid such contentious scenarios, states, e.g., Colombia, often exclude survivor-perpetrators

1112 Schotsmans, *Victims' Expectations, Needs and Perspectives After Gross and Systematic Human Rights Violations*, in: de Feyter et al. (eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations,* 2005, 105, 107; Borer, *A Taxonomy of Victims and Perpetrators - Human Rights and Reconciliation in South Africa*, 2003 Hum. Rts. Q. 25(4), 1088. Child soldiers are a prime example, Steinl, *Child Soldiers as Agents of War and Peace - A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law*, 2017, 9 ff., on different prevailing images of child soldiers and passim for their treatment in transitional justice. For an illuminating autobiographic account of the complicated histories of child soldiers see Beah, *A Long Way Gone - Memoirs of a Boy Soldier*, 2007.

1113 Humphrey, *The Politics of Atrocity and Reconciliation - From Terror to Trauma*, 2013, 113 captures the problem and cynicism behind it perfectly: "The ambiguity of the 'survivor' is highlighted in the problem of social reparation for the living, as opposed to dead victims. While the dead can be unambiguously made casualties of state repression (war), living victims carry both the scars of repression and the shadow that they too were implicated in or contaminated by violence. Dead victims can be politically appropriated much more easily than living victims (...)." Examples from state practice can be found in Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 157; Sharma et al., *From Relief to Redress*, 32, 40.

1114 Moffett, *Reparations for "Guilty Victims" - Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms* 2016 Intl. J. Transitional Just. 10(1), 146, 148 f.; McEvoy/McConnachie, *Victimology in Transitional Justice - Victimhood, Innocence and Hierarchy*, 2012 Eur. J. Crimonology 9(5), 527, 531 f.

1115 Moffett, *Reparations for "Guilty Victims"*, 151, 153 ff.

1116 Shining Path.

1117 Moraña, *El Ojo que Llora - Biopolítica, Nudos de la Memoria y Arte Público en el Perú de Hoy*, 2012 Latinoamérica 54, 183, 204 ff.; *Humala Sobre Chavín de Huántar - No voy a Dar ni un Sol a los Terroristas*, RPP Noticias, 26 June 2015; Burt, *Transitional Justice in the Aftermath of Civil Conflict*, 21 f. See also below, E.IV.4.

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from reparation programs.[1118] On the one hand, this avoids tension and protects the reparation program, if not the whole transitional justice process, from becoming delegitimized in the public's eyes. On the other hand, excluding survivor-perpetrators sends a deeply troubling message. It gives the impression that the applicability of human rights depends on righteous conduct. The hierarchy created between "problematic" and "unproblematic" survivors goes against human rights' inalienable nature. Persons enjoy them regardless of some notion of moral worthiness. Thus, the object and purpose of the right to reparation in transitional justice lend some force to both sides.

A thorough analysis of survivor-perpetrators' exclusion must distinguish between two scenarios: First, states exclude this category of survivors solely because of their "problematic" status.[1119] Second, they could be excluded because they receive benefits through a DDR-program.

The first reason for exclusion could find some support in the ECtHR's jurisprudence in McCann. The court held that "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award" for pecuniary or non-pecuniary damage.[1120] This jurisprudence is deeply flawed, as it effectively amounts to a forfeiture of human rights based on previous actions. Such a notion similar to the clean hands doctrine does not exist in international human rights law, as the ECtHR noted in Hirst.[1121] Accordingly, the court's holding is subject to severe criticism, not followed by any other international human rights court or treaty body, and

1118 See above, ch. 2, C.IV.1.

1119 Burt, *Transitional Justice in the Aftermath of Civil Conflict*, 9; Guillerot, *Reparations in Peru*, 20; Secretary of State of Northern Ireland, Victims' Payments Regulations 2020, art. 6(2); Cammack, *Reparations in Malawi*, 231, 237. Some states have separate reparation programs for survivor-perpetrators, see e.g. Sharma et al., *From Relief to Redress*, 32; Martínez/Gómez, *A Promise to be Fulfilled*, 18. Moffett makes different suggestions on how to repair survivor-perpetrators while maintaining a difference to survivors, who did not victimize others, Moffett, *Reparations for "Guilty Victims"*, 162 ff.

1120 ECtHR, *McCann and Others v. United Kingdom*, 18984/91, para 219.

1121 ECtHR, *Hirst v. United Kingdom (No. 2)*, 74025/01 (Grand Chamber), 2005, explicitly saying that "[t]here is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion", para 84; Laplante, *The Law of Remedies and the Clean Hands Doctrine - Exclusionary Reparation Policies in Peru's Political Transition*, 2009 Am. U. Intl. L. Rev. 23(1), 51, 64 ff.

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apparently given up by the ECtHR itself.[1122] Instead, (partially) losing a right due to previous conduct is treated as a limitation of said right,[1123] which will be discussed below.[1124]

Regarding the second scenario, states sometimes argue that perpetrators already benefit from DDR-programs, making them ineligible for further reparation. This argument is valid if the benefits received under the DDR-program constituted reparation.[1125] As stated above, states are free to create an independent reparation program for survivor-perpetrators. Usually, though, they do not. Benefits distributed in DDR-programs usually serve the sole purpose of reintegrating perpetrators into society and lack an acknowledgment of wrongdoing and responsibility. In that case, DDR-programs do not discharge the obligation to repair because the benefits do not constitute reparation.[1126] Awarding survivor-perpetrators reparation in addition to those benefits is then not foreclosed by the prohibition of enrichment of survivors.[1127]

1122 Ichim, *Just Satisfaction Under the ECHR*, 169 f.; Moffett, *Reparations for "Guilty Victims"*, 160 ff.; Shelton, *Remedies in International Human Rights Law*, 151 f. A recent judgment of the ECtHR raises doubts, whether the court's renunciation of such jurisprudence still stands. The court held that asylum seekers "illegally" entering Spanish territory could be turned away without having access to individual proceedings, because they failed to avail themselves of supposedly available legal possibilities of entry, ECtHR, *N.D. and N.T. v. Spain*, para 206 ff. Again the court suggests the deeply flawed and dangerous notion that states can take courses of action that would violate human rights, if the individuals concerned did not act illegally before. Critique of the judgment has hence rightfully been damning, Ciliberto, *A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens - The Applicant's Own Conduct in N.D. and N.T. v Spain*, 2021 Hum. Rts. L. Rev. 21(1), 203; Raimondo, *N.D. and N.T. v Spain - A Slippery Slope for the Protection of Irregular Migrants*, Border Criminologies, 20 April 2020; Markard, *A Hole of Unclear Dimensions – Reading ND and NT v. Spain*, EU Immigration and Asylum Law and Policy, 1 April 2020. Whether the court was right in its assessment that legal procedures for entry were available to the applicants must be doubted, Forensic Architecture, *Pushbacks in Melilla – ND and NT v. Spain*, 2020.

1123 ECtHR, *Hirst v. United Kingdom (No. 2)*, 74025/01 para 71.

1124 See E.II.4. There are circumstances however, in which the human rights of perpetrators are not violated by conduct, which would violate the human rights of non-perpetrators, e.g. when members of non-state armed forces are injured due to legitimate use of force under international humanitarian law. Since this study presupposes the existences of legitimate claims for reparation and only analyses the output such claims necessitate, the scenario will not be further discussed.

1125 This was supposed to be the case in Colombia, see above, ch. 2, C.IV.1.

1126 See above, Introduction, C.

1127 cf. IACtHR, *La Cantuta v. Peru*, 2006, para 202 and IACtHR, *Goiburú et al. v. Paraguay,* 22 September 2006, para 143, stating that reparation measures may not

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Survivor-perpetrators do not receive double reparation but reparation and a voluntary benefit.

Excluding participants in DDR-programs from reparation programs even though they do not receive reparation in the DDR-program could be justified by claiming that they waived their right to reparation upon entering the DDR-program. In principle, individuals can waive their human rights if the right concerned protects the individual sphere, making it less critical for society.[1128] Such is the case with the right to reparation, as its primary objective is to overcome individual harm.[1129] Even though the additional transitional justice goals to establish respect for human rights and generalized trust are relevant to society, they do not suffer from waivers. Voluntary waivers do not undermine the message of validity, applicability, enforceability, and importance of human rights. Yet, waivers must be free, unequivocal, and informed.[1130] While procedural safeguards in DDR-programs can secure the last two requirements, the first is problematic. A waiver is only free if it is concluded without any form of coercion, neither direct nor through circumstance.[1131] Given that waivers strongly affect the individual and may

enrich survivors. See also above, ch. 1, D., on the role of proportionality in limiting reparation to the actual loss incurred.

1128 de Schutter, *Waiver of Rights and State Paternalism Under the European Convention on Human Rights*, 2000 N. Ireland L. Q. 51(3), 481, 482; Aall, *Waiver of Human Rights - Setting the Scene (Part I/III)*, 2010 Nordic J. Hum. Rts. 28(3), 300, 357 ff.; Caflisch, *Waivers in International and European Human Rights Law*, in: Arsanjani et al. (eds.), *Looking to the Future - Essays on International Law in Honor of W. Michael Reisman,* 2011, 407, 422, 424; ECtHR, *Neumeister v. Austria (Article 50)*, 1936/63 (Chamber), 1974, para 36; IACtHR, *Kimel v Argentina (Merits, Reparations and Costs)*, para 26, 36, operative para 4; IAComHR, *Annual Report of the Inter-American Commission on Human Rights 2012*, 2012, 122. The HRC expressed scepticism about waiving access to judicial overview of reparation programs, but did not specify on which grounds, HRCom, *Report on Follow-Up to the Concluding Observations of the Human Rights Committee,* CCPR/C/119/2, 2017, 10, 12 ff. It did not reject the possibility of a waiver outright, as it did e.g. concerning certain rights pertaining to the right to vote, HRCom, *General Comment No. 25 - Article 25 (Participation in Public Affairs and the Right to Vote),* CCPR/C/21/Rev.1/Add.7, 1996, para 20. The IACtHR held that a waiver of the right to access to justice and truth in exchange for financial support is not compatible with the convention without specifying the reasons for this holding, IACtHR, *González et al. ("Cotton Field") v. Mexico*, 2009, para 558.

1129 The IACtHR considered the waiver of the right to reparation possible, IACtHR, *Case of the Rio Negro Massacre v. Guatemala,* 2012, para 253.

1130 An overview of conditions for the validity of waiver in the european system is given by de Schutter, *Waiver of Rights*, 489 ff.; Aall, *Waiver of Human Rights (I)*, 324 ff.

1131 Aall, *Waiver of Human Rights (I)*, 339 f.

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jeopardize human rights protection, the threshold for assuming coercion is low. Coercive circumstances can already exist if the benefits obtained through waiving a right are markedly disproportionate to the disadvantages of a refusal to waive.[1132] This problem is especially salient if the decision concerns essential goods, such as the possibility to earn a living.[1133]

A waiver of the right to reparation as a requirement to enter a DDR-program can hardly meet these standards. Often, DDR-programs are individuals' best or even only chance to start a successful civilian life and reintegrate into society. Sometimes they even are the only option to leave an armed faction. Reparation is no substitute for that. It is often not offered when a person enters a DDR-program and does not focus on reintegration into society from a former combatant's perspective.[1134] Under these circumstances, the waiver's benefits and the disadvantages of a refusal to waive will often be out of all proportion. Accordingly, most waivers of the right to reparation would be void. In addition, waiving their right to reparation would require survivor-perpetrators to fully and visibly embrace the assigned role as perpetrator only, further invisibilizing their identity as a survivor. Apart from the societal and political effects described at the beginning of the present section, this could be an additional source of revictimization.[1135]

Therefore, if states want to exclude survivor-perpetrators from reparation programs because they receive benefits through a DDR-program, these benefits must constitute reparation. Only then does the state discharge its obligation to repair. In that scenario, DDR-programs must adhere to the standards discerned in this chapter. The benefits received through the program must have an adequate relation to the harm suffered and be given in acknowledgment of the state's wrongdoing and responsibility towards survivor-perpetrators.

1132 ECtHR, *Deweer v. Belgium*, 6903/75 (Chamber), 1980, para 51, 54. In the case, a Belgian butcher paid 10.000 Belgian Francs by way of friendly settlement, in order to avert the closure of his shop due to violations of limits on pricing. The settlement barred him from taking any legal action. The Court found that the prospect of having to close the shop as his only means of income for the duration of proceedings against the order before national courts – possibly several months – were "by far a lesser evil" than paying 10.000 Francs. This "flagrant disproportion" exerted pressure on the applicant to a degree that his waiver was not free. See also de Schutter, *Waiver of Rights*, 489 ff.; Aall, *Waiver of Human Rights (I)*, 337 ff.

1133 Aall, *Waiver of Human Rights (I)*, 340.

1134 de Greiff, *DDR and Reparations*, 344 ff.

1135 I am indebted to Tim Schneider for drawing my attention to this aspect of the use of waivers.

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2. Indirect Survivors

Chapter one distinguished between indirect survivors whose own rights were violated and those who only suffered harm because of the violation of the direct survivor's rights.[1136] Regarding the former, there is no justification for excluding them if no violation can be excluded. The mere fact that a primary violation gave rise to a secondary violation does not change the fact that there has been a violation of the indirect survivor's rights. Furthermore, there is no general assumption that indirect survivors suffer less than direct survivors. Accordingly, the IACtHR ordered reparation for indirect survivors, who received only inadequate redress from a domestic reparation mechanism.[1137] States retain some flexibility, though, when defining indirect survivors. The Basic Principles carefully demand the reparation of indirect survivors only "where appropriate and in accordance with domestic law."[1138] The exact scope of persons included in the notion varies greatly in international practice.[1139] International jurisprudence acknowledges that the definition of indirect survivors varies with cultural circumstances.[1140]

Regarding persons who did not suffer a violation of their rights, only the IACtHR and the ECtHR award them reparation. Their jurisprudence relies on the wordings of their respective conventions, enabling them to provide reparation to an "injured party".[1141] Other treaties or soft law documents do not recreate such a distinction between a survivor and an injured person. Hence, the jurisprudence seems specific to the two regional human rights courts, based on Art. 41 ECHR and Art. 63(1) ACHR respectively. Accordingly,

1136 For details on that distinction see above, ch. 1, B.

1137 IACtHR, *Gomes Lund v. Brazil*, para 309 ff.

1138 UNGA, *Basic Principles*, A/RES/60/147, para 8. The value of the Basic Principles in the determination of the law on reparation in transitional justice is unclear. They only mention administrative reparation programs in para 16 as a way to redress survivors of violations by non-state actors, if these actors do not repair the survivor themselves. Other than that, the principles seem to give primacy to judicial proceedings. Still, they are regularly taken as a basis for administrative programs as well.

1139 Cano/Ferreira, *The Reparations Program in Brazil*, 115, 126; Guembe, *The Argentinean Experience*, 26; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 63, 80; Sharma et al., *From Relief to Redress*, 37; Cámara de Diputados de Paraguay, Ley No. 838, art. 6 ; Asamblea General de Uruguay, Ley No 18.596, art. 11.

1140 See above ch. 1, B.II.

1141 See above, ch. 1, B.II.

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such persons do not constitute survivors for the purpose of the right to reparation and need not be repaired.[1142]

III. Excluding Dates

Lastly, some reparation programs only redress violations before or after a specific date. Again, this is a legitimate consideration if it only aims at giving the reparation program a clear scope and purpose and if other survivors retain different avenues to claim redress. In contrast, Colombia only redresses survivors who suffered violations from the year 1985 onwards. Such cut-off dates are often born out of concern for evidentiary difficulties. That, however, is no legitimate consideration on the level of eligibility. The difficulties in obtaining evidence rarely go to the disadvantage of the state. The survivor bears the initial burden of proof and usually faces much more significant evidentiary obstacles.[1143] Therefore, it is the survivor's decision whether to embark upon the task to prove a violation.

Extinctive prescription could justify a general cut-off date.[1144] However, it is doubtful whether that principle exists and applies to claims arising from human rights.[1145] To the knowledge of the author, no state has relied on prescription with regard to reparation. Human rights jurisprudence has given reparation to survivors long after the events in question occurred.[1146] Even if it did apply, the conditions of prescription will usually not be met. Extinctive

1142 They can of course be the heirs of the direct survivor's claim to reparation. On that topic see Wühler, *Reparations and Legal Succession*.

1143 See below, D.II.

1144 Importantly, this does not concern the complex question of reparation for historic injustices. Here, the main legal question is not prescription, but whether a claim exists in the first place given the principle of intertemporality. This question can of course also play a role in transitional justice reparation programs, if they concern violations happening before the rise of an individual right to reparation. However, since the existence of a claim is presumed throughout this study, this question will not be examined. On details see above, Introduction, B.

1145 To the knowledge of the author, it has never been applied to claims arising out of the violation of a human right. Against its application altogether in relation to compensation in international law, Ronzitti, *Access to Justice and Compensation for Violations of the Law of War*, in: Francioni (ed.), *Access to Justice as a Human Right,* 2007, 95, 114.

1146 Consider IACtHR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, in which the court ordered the state to identify survivors of the massacer concerned in order to repair them more than thirty years after the events, para 310.

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prescription applies only if the claimant presents the claim with unreasonable delay. If there were valid reasons to delay the claim – e.g., conflict or fear – it does not apply.[1147] Most survivors encounter significant obstacles to present their claim in transitional justice settings.[1148] Under these circumstances, only isolated cases could fulfill the prescription criteria, making the concept inept at justifying a general cut-off date.

Instead of relying on international law, states could apply domestic statutes of limitation to claims arising from human rights violations. In principle, the obligation to provide an effective remedy allows the application of statutes of limitation.[1149] Some international practice holds that domestic statutes of limitations are inapplicable to reparation claims, especially concerning human rights violations amounting to international crimes.[1150] It is argued that since the prosecution of these crimes cannot be subject to statutes of limitation, neither should claims for damages resulting from such crimes.[1151]

1147 Wouters/Verhoeven, *Prescription*, in: Wolfrum (ed.), *Max Planck Encyclopedia of International Law,* Online Edition 2008, para 6, 10.

1148 See below, D.

1149 Shelton, *Remedies in International Human Rights Law*, 97; ECtHR, *Guzzardi v. Italy*, 7367/76 (Plenary), 1980, para 72; ECtHR, *Cardot v. France (Preliminary Objections)*, 11069/84 (Chamber), 1991, para 34; IACtHR, *Velásquez-Rodríguez v. Honduras (Merits)*, 1988, para 67. Here the court speaks only of the possibility that claims are not presented in a timely manner, not specifying whether that relates to prescription or to a procedural requirement to present a claim within a certain timeframe. All cited judgments are concerned with the procedural requirements of the exhaustion of local remedies. Since in the jurisprudence of the respective courts, only effective remedies must be exhausted, it can be assumed that the jurisprudence is transferrable to the substantive requirements under the obligation to provide an effective remedy. On that see Schabas, *The European Convention on Human Rights - A Commentary*, 2017, 765; IACtHR, *Advisory Opinion on the Exceptions to the Exhaustion of Domestic Remedies*, OC-11/90, 1990, para 21 ff.

1150 ECOSOC, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity,* E/CN.4/2005/102/Add.1, 2005, principle 23; CAT, *GC 3*, CAT/C/GC/3, para 40; OHCHR, *Preliminary Observations from the Official Visit to Bosnia and Herzegovina by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Mr. Fabián Salvioli (2-10 December 2021),* 2021; IACtHR, *Ordenes Guerra and Others v. Chile,* 2018, para 86 ff.; IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 118.

1151 IACtHR, *Ordenes Guerra and Others v. Chile,* 2018, para 86 ff.; IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 118; Ronzitti, *Access to Justice*, 113 f., although explicitly arguing de lege ferenda. The position finds support in IACtHR, *Case of Barrios Altos v. Peru (Merits)*, 2001, para 41 ff. Although mostly concerned with barriers to prosecution, the court states that laws erecting such

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However, the parallelism between prosecution and reparation is a mere assertion. Each is a separate obligation, subject to different conditions.[1152] Several states apply statutes of limitation to reparation for grave human rights violations, depriving the practice of the necessary uniformity to support such an independent exception.[1153]

The CAT relies on a continuous effect theory to disallow the application of domestic statutes of limitation, asserting that claims should not be time-barred since the damage persists.[1154] The IACtHR displayed an inclination

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barriers, including prescription laws, prevent survivors from receiving reparation. While the customary nature of the prohibition to subject international crimes to statutes of limitation is not unchallenged, the majority of state practice and scholarship supports that character, Pinzauti, *Principle 23*, in: Haldemann/Unger (eds.), *The United Nations Principles to Combat Impunity - A Commentary,* 2018, 250, 252 ff.

1152 van den Herik, *Addressing "Colonial Crimes" Through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia*, 2012 J. Intl. Crim. Just. 10(3), 693, 699. Van den Herik does however cite a Dutch ruling casting aside statutory limitations for reparation claims.

1153 Hessbruegge, *Justice Delayed, not Denied - Statutory Limitations and Human Rights Crimes*, 2011 Geo. J. Intl. L. 43(4), 335, 373 ff. Even most of the few supporting incidents Hessbruegge cites are not as clear as may seem. The pronunciations of UN treaty bodies on Aboriginal lost generations and comfort women either relate solely to the inapplicability of statutes of limitations to prosecution or do not elaborate why they deem reparation still to be an obligation. As will be explained below, instead of the inapplicability of statutes of limitations, it could also be argued that they cannot be applied because no effective remedy was available to survivors before. Hessbruegge's citation from the Basic Principles could also just relate to prosecution, given that the preceding paragraph relates solely to prosecution and only the following paragraph states that statutes of limitation for civil claims "should not be unduly restrictive". Some practice in favour of a general inapplicability of statutes of limitations to reparation claims is cited in Kok, *Statutory Limitations in International Criminal Law*, 2007, 46, 48, 70 ff. In Malawi, the National Compensation Tribunal could waive the statute of limitation for individual cases, showing that, in principle, the statute applied, Cammack, *Reparations in Malawi*, 228. In Argentina, the statute of limitation applied, but only began to run after democracy was restored, because before, survivors had no effective remedy. Some courts did not apply the statute of limitation at all, Guembe, *The Argentinean Experience*, 28 ff. In Chile, courts differed on whether the statute of limitation should apply. The Supreme Court decided that it applied, whereas single lower courts found it inapplicable, Lira, *The Reparations Policy for Human Rights Violations in Chile*, 89 f.

1154 CAT, *A v. Bosnia and Herzegovina*, CAT/C/67/D/854/2017, 854/2017, 2019, para 7.5; CAT, *GC 3*, CAT/C/GC/3, para 40. See also Commission on Human Rights, *Final Report Submitted by Mr. Theo van Boven*, E/CN.4/Sub.2/1993/8, para 135. The IAComHR made similar statements, but in the end assessed the proportionality of statutes of limitations, as suggested here, although leaving little room to apply proportionate statutes of limitation to reparation claims for crimes against humanity,

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towards that view but did not rely on it when determining the inapplicability of statutes of limitations to reparation claims for crimes against humanity on another occasion.[1155] International practice supporting the inapplicability of statutes of limitation to continuing violations relies on the continuous commission, not persistent damages.[1156] In the latter case, international practice allowed statutes of limitation to apply, undermining this position.[1157]

Hessbruegge claims that national statutes of limitation cannot bar international claims because national law cannot justify non-compliance with international law.[1158] This argument misconstrues the problem. It is not argued that domestic statutory limitations in and of themselves can bar international claims. Instead, the question is whether the right to an effective remedy gives states the freedom to apply domestic statutes of limitation as a legitimate restriction, which, as shown, it does.

Still, as any restriction of a right, statutes of limitation must be necessary and proportionate. They must hence not be unduly short.[1159] Furthermore, it would be disproportionate to apply statutes of limitation to individuals who

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IAComHR, *Compendium,* OEA/Ser.L//V/II.Doc. 121, para 183; IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 118, 129; IAComHR, *Ordenes Guerra y Otros v. Chile, Merits Report,* 52/16, 2016, para 130 ff. (inexplicably, the Spanish and English versions of the report differ).

1155 The court noted that although Chile's statute of limitation covered grave human rights violations in principle, some domestic courts did not apply it to such cases. It further stated that the previously cited CAT, *GC 3*, CAT/C/GC/3, para 40 and other documents with a similar line of argument should be taken into account, IACtHR, *García Lucero et al. v. Chile*, para 204. In Ordenes Guerra, the court deemed Chile's statute of limitation inapplicable but did not repeat the argument of continuous effects, even though the commission mentioned it in its report on the case, IACtHR, *Ordenes Guerra and Others v. Chile,* 2018, para 86 ff.; IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 118.

1156 Kok, *Statutory Limitations*, para 41, 114. On the difference, Neuner, *The Notion of Continuous or Continuing Crimes in International Criminal Law,* in: Kaleck/Bergsmo/Hlaing (eds.), *Colonial Wrongs and Access to International Law,* 2020, 123, 129. The ICTR held that the commission of an act must be differentiated from its effects, ICTR, *Nahimana, Barayagwiza and Ngeze v. The Prosecutor, Judgment,* ICTR-99-52-A (AC), 2007, para 723.

1157 It is reasonable to assume that grave human rights violations cause persistent damage. Hence, the practice review in fn. 1153 also applies to this question.

1158 Hessbruegge, *Justice Delayed, not Denied*, 373.

1159 ECtHR, *Stubbings and Others v. The United Kingdom*, 22083/93, 1996, para 53; UNGA, *Basic Principles*, A/RES/60/147, para 7; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 18, although concerned with prosecution rather than reparation.

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were unable to access a remedy for no fault of their own.[1160] Otherwise, states would profit from an illegal situation they helped create. They are obligated to provide effective access to justice, including a general environment that makes remedies accessible.[1161] Benefitting from the contrary situation by having claims time-barred would contravene the principle ex iniuria ius non oritur.[1162] It would give states an incentive to evade their obligation to repair by preventing survivors from accessing the justice system.

Thus, in principle, states can introduce a cut-off date for reparation based on domestic statutes of limitation. These statutes must not be unduly restrictive and do not apply if it was impossible or too onerous for survivors to make their claims on time. Given the circumstances prevailing in times of systematic human rights violations, the last-mentioned exception will usually apply.[1163] In practice, a general cut-off date is therefore not likely to conform to international standards.

1160 ECtHR, *Howald Moor v. Switzerland*, 52067/10, 2014, para 74 ff.; ECtHR, *Eşim v. Turkey*, 59601/09 (Second Section), 2013, para 19 ff. The HRCom held that a remedy was ineffective because the applicant was unable to avail herself of it within the short timeframe until statutes of limitations applied. She was first detained and then social stigma and a lack of information precluded her from accessing the remedy, HRCom, *Nyaya v. Nepal*, 2556/2015, para 6.4; *Cayuga Indians (Great Britain) v. United States*, R.I.A.A. VI, 1926, 173, 189. Japanese and Argentinean courts applied the same standards, Bong, *Compensation for Victims of Wartime Atrocities - Recent Developments in Japan's Case Law*, 2005 J. Intl. Crim. Just. 3(1), 187, 199 f.; Guembe, *The Argentinean Experience*, 28 ff. See further, US Court of Appeals, *Arce v. Garcia*, 2006, para 18 ff.; Kok, *Statutory Limitations*, 201; UNGA, *Declaration on the Protection of All Persons From Enforced Disappearance,* A/RES/47/133, 1992, art. 17(2).

1161 See below, D.

1162 "Law does not arise from injustice". On the applicability of the doctrine see ICJ, *Gabčíkovo-Nagymaros Case,* para 132; CERD, *Dragan Durmic v. Serbia and Montenegro*, CERD/C/68/D/29/2003, 29/2003, 2006, para 9.4; IACtHR, *Cotton Field Case*, para 558. A detailed treatment can be found at Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 1957 Collected Courses of the Hague Academy of International Law 92, 1, 117 ff.

1163 Medina Quiroga, *The American Convention on Human Rights - Crucial Rights and Their Theory and Practice*, 2nd Edition 2016, 361; Ibañez Rivas, *Artículo 25*, in: Steiner/Uribe (eds.), *Convención Americana Sobre Derechos Humanos - Comentario,* 2014, 606, 616.

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IV. A Necessary Restriction?

From what has been examined so far, only in very exceptional circumstances can states limit eligibility for reparation programs, as long as they do not provide the remaining survivors with other adequate avenues for redress. The exceptional nature of these circumstances makes general restrictions on eligibility unlikely to be legal. Thus, full comprehensiveness of reparation programs is not only a lofty goal. With few exceptions, it is an obligation. Teleological considerations support this position. Full comprehensiveness communicates that all human rights are valid, applicable, enforceable, and important, not just for certain people under certain circumstances. While this position is noble, it means that reparation programs need to accommodate much more survivors than they currently do – up to the point at which the majority of a state's population could be eligible. Such a bold position necessarily raises strong objections: First, in most cases, it will be impossible to fulfill. Second, even if possible, the benefits awarded would need to be diluted to a degree that makes them meaningless. Third, if most of the population is considered survivors, the status itself becomes meaningless.[1164]

The last objection is a mere assertion about the subjective perception of a status by the general population. It is unclear why the survivor status would become meaningless because many persons suffered from violations, especially since a distinction between grave and less grave violations remains possible.[1165] Also, following the objection would mean denying survivors their right to make the status more meaningful to others. It would mean glossing over the fact that systematic human rights violations occur on many levels, not only concerning bodily integrity but also economic inequality, widespread structural violence, etc.

The other two objections come down to the argument that restrictions on eligibility are simply a necessary restriction of the right to reparation. As a testimony to their strength, they can only be countered thoroughly below once other essential considerations are established. For now, a brief

1164 de Greiff, *Articulating the Links Between Transitional Justice and Development - Justice and Social Integration*, in: de Greiff/Duthie (eds.), *Transitional Justice and Development - Making Connections,* 2009, 28, 40; Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, 468 f.; Duthie, *Toward a Development-Sensitive Approach to Transitional Justice*, 2008 Intl. J. Transitional Just. 2(3), 292, 307.

1165 See below, E.IV.2.b.

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anticipation of the complete argument must suffice.[1166] It will be argued that the state must strike a fair balance between survivors' right to reparation and all other legitimate claims against its resources. That allows the state to lower the amount of reparation awarded to the degree necessary and proportionate to fulfill its other obligations. Per definition, this enables the state to repair all survivors with the resources it has at the given moment. Of course, this makes the dilution objection all the more pressing. In response, it will be argued that purely symbolic reparation can repair less grave harm. That way, most survivors receive less costly but still meaningful symbolic measures, freeing enough resources to award meaningful material reparation to those who suffered the most significant harm. Broadly balancing the relevant positions and repairing most survivors through symbolic means is a less intrusive measure to make reparation work in transitional justice. Far-reaching restrictions on eligibility are hence not necessary. What sounds much like wishful thinking now will hopefully be conclusively argued later. For now, one last challenge remains: The proposal contradicts most contemporary state practice – relevant to interpretation according to Art. 31(b), 32 VCLT.

V. A Restriction Based on State Practice?

The Special Rapporteur on Transitional Justice rightfully noted that no reparation program had achieved full comprehensiveness.[1167] It might be added that no program even tried. This seemingly unanimous practice in favor of restricting eligibility could justify interpreting the right to reparation to allow such restrictions. However, states rarely provide any reason for limiting eligibility, making it hard to read the practice as support for any concrete rule that excludes specific survivors. Furthermore, states regularly amended their reparation programs as a reaction to protest from previously excluded survivors or court rulings.[1168] In the same vein, international courts and treaty bodies regularly ordered reparation for individuals outside the scope of

1166 Impatient readers are invited to skip directly to the full argument below, esp. E.II.4, III., IV.2.

1167 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 26.

1168 Cano/Ferreira, *The Reparations Program in Brazil*, 106, 124, 141; Guembe, *The Argentinean Experience*, 33 f., 43 f.; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 67, 79; Sharma et al., *From Relief to Redress*, 28; ICTJ, *Reparations in Peru - From Recommendations to Implementation*, 2013, 19 f.

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national reparation programs.[1169] The IACtHR even held that survivors who already received reparation through a program had to be repaired again for violations not covered by the first award.[1170] Thus, often, the initial exclusion did not hold up in court or against political realities.

Beyond the inconclusiveness of international practice, it is doubtful whether even consistent practice could justify the large-scale exclusion of survivors from reparation programs. As seen above, the right to reparation leaves no room for such exclusion when defining its scope of protection, and as a limitation, it will rarely be necessary.[1171] Accordingly, allowing large-scale exclusion of survivors might be beyond the reach of interpretation and warrant an amendment of the respective norms.

VI. Conclusion: An Illegal Bottleneck

Neither the specific nor general justifications for restricting eligibility hold up against scrutiny. Only restrictions based on waiver and statutes of limitations can apply to isolated cases under narrow circumstances. It follows that with very few exceptions, all survivors must receive reparation. The enormous challenge this restrictive position on limiting eligibility poses to the content of reparation programs will be taken up below. First, the analysis will proceed chronologically: Full comprehensiveness must turn into completeness – that is, every survivor must become a beneficiary of the respective reparation program.[1172] This is only possible if every survivor is identified as such and manages to enter the program. For that, a successful intake procedure is crucial.

D. Intake

The case studies showed that instead of relying on survivors to initiate reparation claims, states proactively encourage them to enter reparation

1169 Moffett, *Reparations in Transitional Justice - Justice or Political Compromise?*, 2017 Hum. Rts. Intl. Legal Discourse 11(1), 59, 63; IAComHR, *Rufino Jorge Almeida v. Argentina, Merits Report,* 147/18, 2018, para 55 ff.

1170 IACtHR, *Vargas et al. v. Chile*, para 175; IACtHR, *Yarce et al. v. Colombia (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs)*, para 41.

1171 See above, C.I-IV.

1172 OHCHR, *Reparation Programmes*, 15.

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programs. For that, each survivor must know about the program, present themselves, and must be able to prove their status. This intake procedure is decisive to achieve the completeness of the program.

States' obligations in this realm derive from the right to access justice. Access to domestic justice was already part of the standard of treatment of aliens. In modern times, the obligation is based on the human right to an effective remedy and fair trial and has achieved customary status.[1173] It obliges states to organize their institutions so that all individuals have a real and practical opportunity to access a remedy.[1174] Access has a normative and an empirical dimension. On the normative side, remedies must not be limited too strictly by procedural or substantive rules, e.g., statutes of limitation. On the empirical side, accessing remedies must not place a disproportionate burden on potential claimants, e.g., because remedies are too far removed from their place of residence or because of too onerous costs.[1175] Furthermore, states must take care to provide equal access to justice, considering the special vulnerabilities of certain potential claimants.[1176]

1173 Importantly, this only holds true for the right to access domestic justice mechanisms, not necessarily international ones, Francioni, *The Rights of Access to Justice Under Customary International Law*, in: Francioni (ed.), *Access to Justice as a Human Right,* 2007, 1, 10 ff., 41; Schmitt, *Access to Justice and International Organizations - The Case of Individual Victims of Human Rights Violations*, 2017, 97 ff.

1174 Shelton, *Remedies in International Human Rights Law*, 96; UNGA, *Basic Principles*, A/RES/60/147, para 3(c), 11(a), 12 ff.; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 15; IAComHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights - A Review of the Standards Adopted by the Inter-American System of Human Rights,* OEA/Ser.L/V/II.129, 2007, para 245 ff.; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principles C(b)(1), K, P(a)(d); IACtHR, *Castañeda Gutman v. Mexico*, 2008, para 100; ECtHR, *Bellet v. France*, 23805/94 (Chamber), 1995, para 34; CAT, *A v. Bosnia and Herzegovina*, 854/2017, para 7.5; CAT, *GC 3*, CAT/C/GC/3, para 5; HRCom, *Gyan Devi Bolakhe v. Nepal*, CCPR/C/123/DR/2658/2015, 2658/2015, 2018, para 7.11.

1175 IAComHR, *Access to Justice*, OEA/Ser.L/V/II.129, 245 ff.; Shelton, *Remedies in International Human Rights Law*, 97 ff. Examples of non-legal impediments for accessing justice can be found in UNDP, *Programming for Justice - Access for All*, 2005, 138 f.; van Rooij/van de Meene, *Access to Justice and Legal Empowerment - Making the Poor Central in Legal Development Co-Operation*, 2008, 10 f.

1176 AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle K; IACtHR, *Saramaka People v. Suriname*, 2007, para 178; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, 2005, para 63.

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Any restrictions on accessibility, be it on the normative or empirical dimension, must be necessary and proportionate for the proper administration of justice or other legitimate aims.[1177]

In the following, these general principles will receive further specification with regard to the most critical aspects of the intake process – outreach (I.) and evidence (II.). The section closes with brief remarks about other potential barriers (III.).

I. Outreach

A lack of information about existing remedies must not impede access to justice.[1178] States cannot rely solely on the initiative of survivors in seeking such information.[1179] Instead, they must actively inform survivors in a way that allows them to realize their right to reparation effectively.[1180] This standard requires information about the possibility to claim reparation and information about how to enter and navigate the process.[1181] As stated above,

1177 IACtHR, *Cantos v. Argentina*, 2002, para 50; ECtHR, *Stubbings and Others v. The United Kingdom*, 22083/93, para 50; HRCom, *General Comment No. 32 - Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial*, CCPR/C/GC/32, 2007, para 18.

1178 ECtHR, *M.S.S. v. Belgium and Greece*, 30696/09 (Grand Chamber), 2011, para 304; ECtHR, *Hirsi Jamaa v. Italy*, 27765/09 (Grand Chamber), 2012, para 204; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle K(d), P(d); IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 12; HRCom, *Nyaya v. Nepal*, 2556/2015, para 7.9; UNGA, *Basic Principles*, A/RES/60/147, para 11(c), 24; Art. 9(5) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

1179 IACtHR, *Case of the Ituango Massacres v. Colombia*, 2006, para 340; IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*, 2006, para 209; CAT, *GC 3*, CAT/C/GC/3, para 29; CAT, *Estela Deolinda Yrusta and Alejandra del Valle Yrusta v. Argentina*, CAT/C/65/D/778/2016, 778/2016, 2019, para 7.9.

1180 Cammack, *Reparations in Malawi*, 232; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 61, 73, 84; ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste*, 12; Guillerot, *Reparations in Peru*, 27, 28 f.; ICTJ, *Reparations in Peru*, 9; ILA, *Reparation for Victims of Armed Conflict,* Resolution 1/2014, 2014, principle 5; ECOSOC, *Impunity Principles*, E/CN.4/2005/102/Add.1, principle 33; ECOSOC, *Principles on Housing and Property Restitution for Refugees and Displaced Persons,* E/CN.4/Sub.2/2005/17 Annex, 2005, principle 13.4, 13.8; UNGA, *Basic Principles*, A/RES/60/147, para 12(a), 24; IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 12.

1181 CAT, *GC 3*, CAT/C/GC/3, para 29; CAT, *Yrusta v. Argentina*, 778/2016, para 7.9. The Special Rapporteur on Transitional Justice demands that states inform survivors

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to provide truly equal access to justice, states must take due care to reach all survivors, including marginalized ones and survivors in remote places.[1182]

II. Evidence

Evidentiary requirements present an enormous barrier to claim reparation in transitional justice situations. In principle, survivors must demonstrate their eligibility by providing proof that a violation occurred, that the state bears responsibility, and the extent to which they suffered harm because of it. Such evidence is difficult to provide in most transitional justice situations.[1183] In Colombia, the fact alone that 79 % of the land was not registered hindered many survivors of displacement from proving their ownership over land and concurrent right to restitution. To combat such evidentiary problems, most reparation programs ease evidentiary requirements substantially and systematically help with procuring evidence.[1184] When doing so, states need to find a balance. A high evidentiary threshold produces more false negatives. The program could become adversarial, risking revictimizing

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of their right to reparation, available programs and registration processes, HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 48, 53. As one example from state practice, Malawi explains survivors their rights, the procedure, how they can make a claim as well as the mandate and goals of the National Compensation Tribunal, Cammack, *Reparations in Malawi*, 232.

1182 CAT, *GC 3*, CAT/C/GC/3, para 32; CAT, *Yrusta v. Argentina*, 778/2016, para 7.9.

1183 Combs, *Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions*, 2018 Washington Lee L. Rev. 75(1), 223, 243 ff.

1184 ICTJ, *Reparations in Theory and Practice*, 8; Cammack, *Reparations in Malawi*, 228; Cano/Ferreira, *The Reparations Program in Brazil*, 116 ff., 139 f.; Guembe, *The Argentinean Experience*, 26; Houtte et al., *The UNCC*, 343 f., 440; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 69, 81; ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste*, 11; Statute of the Trust Fund for Victims of Hissène Habré's Crimes, art. 20(2); IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 11; ICTJ, *Reparations in Peru*, 9; HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 57. In inter-state cases, the ICJ also eases the standard of proof for reparation in situations of mass violations that cause evidentiary difficulties,ICJ, *Armed Activities Reparations,* para 106, 114, 124. The importance of that fact was iterated, coupled with criticism for the court's still too strict standard, by some of the judges: ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations – Declaration of Judge Salam,* para 3 ff.; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations – Opinion Dissidente de M. le Juge Ad Hoc Daudet,* para 8 ff.

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survivors or keeping them from applying.[1185] The controversy between the TFV and the Chamber in the Lubanga case is instructive in that regard, as the TFV argued precisely that too demanding intake standards would discourage survivors from applying or make applying even impossible for them.[1186] If the evidentiary threshold is too low, too many false positives might undermine the program, create tension and frustrate real survivors.[1187]

The right to access to justice prohibits making a remedy ineffective by employing a prohibitive standard of evidence.[1188] It follows that survivors must have a reasonable chance of meeting evidentiary standards under the circumstances they find themselves in. Since different groups of survivors will face different evidentiary obstacles, states cannot employ a one-size-fits-all approach. Some obstacles may be inherent in the type of violation – the erasure of evidence is part of enforced disappearance, for example. The circumstances of the offense might produce others – such as displacement from unregistered land. The state must react differently to these situations and help survivors overcome the concrete barriers they face to provide equal access to justice.

International jurisprudence employs distinct techniques to meet the aforementioned standards. While not necessarily directly applicable to the domestic sphere,[1189] they can provide guidance on what can be necessary to provide equal and effective access to justice. Concerning survivor status, human rights supervisory bodies presume state responsibility if a person suffers harm while under state agents' control.[1190] If a state implements a policy to commit certain violations, circumstantial evidence, indirect evidence, or logical inference can link an instance to that policy, establishing

1185 ICTJ, *Reparations in Theory and Practice*, 8.

1186 See above, ch. 2, D.III.2.b.aa.

1187 Moffett, *Transitional Justice and Reparations*, 398.

1188 ECtHR, *Iovchev v. Bulgaria*, 41211/98 (First Section), 2006, para 146; ECtHR, *Radkov v. Bulgaria (No. 2)*, 18382/05 (Fifth Section), 2011, para 38 f.; FRA, *Handbook on European Law Relating to Access to Justice*, 2016, 122 f. Cf. IACtHR, *Case of the Ituango Massacres v. Colombia*, para 340; IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*, para 209. The ICJ stated in the context of inter-state claims that "a less rigorous standard of proof" is "recognized […] in the context of […] compensation affecting large numbers of victims", ICJ, *Armed Activities Reparations,* para 107.

1189 Cf. IACtHR, *Godínez-Cruz v. Honduras (Merits)*, 1989, para 134; ECtHR, *García Ruiz v. Spain*, 30544/96 (Chamber), 1999, para 28.

1190 IACtHR, *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala (Merits)*, 1999, para 169 f.; ECtHR, *Aksoy v. Turkey*, 21987/93, para 61.

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state responsibility.[1191] International bodies presume non-pecuniary harm in cases that almost necessarily produce such harm, e.g., if the survivor suffered a particularly grave human rights violation or lost a close family member.[1192] If the damage's extent is difficult to assess, international bodies often set the amount of reparation in equity.[1193]

Beyond easing standards of proof, the state must also procure evidence itself.[1194] States must investigate credible allegations of human rights violations, collect and secure all available evidence and make the findings available to survivors.[1195] Where evidence is unavailable to survivors or lies within the state's sphere, the state can be obliged to procure it to provide effective access to justice.[1196]

III. Removing Barriers

The obligation to provide access to justice also requires states to remove other disproportionate barriers survivors might face. Time-limits were already considered and will receive more consideration below.[1197] Beyond that, discrimination, harassment, costs, physical remoteness, and many other factors can impede survivors' ability to access reparation programs. As far as

1191 IACtHR, *Bámaca-Velásquez v. Guatemala (Merits)*, para 130.

1192 IACtHR, *Cantoral Benavides v. Peru (Reparations and Costs)*, 2001, para 37; IACtHR, *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala (Reparations and Costs)*, 2001, para 108. Further practice is cited in Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in: Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity - Systems in Place and Systems in the Making,* 2009, 145, 151 ff. The IACtHR further eased the standard of proof where a pattern of a certain violation was established, IACtHR, *Fairén-Garbi and Solís-Corrales v. Honduras (Merits)*, 1989, para 127 ff., 157. For flexibilization of evidentiary standards at the ICC see above, ch. 2, D.

1193 IACtHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay*, 2004, para 288; IACtHR, *Molina-Theissen v. Guatemala*, 2004, para 57.

1194 IAComHR, *Compendium,* OEA/Ser.L/V/II.Doc. 121, para 178

1195 For a comprehensive overview of legal texts and practice see IComJ, *Practitioners' Guide*, 84 ff., 105 ff., 110 ff., 115. See further, HRCom, *Guillermo Ignacio Dermit Barbato et al. v. Uruguay*, 84/1981, para 9.6; ECtHR, *Kaya v. Turkey*, 22729/93 (Chamber), 1998, para 107; ECtHR, *Oğur v. Turkey*, 21594/93 (Chamber), 1999, para 92 f.; IACtHR, *Juan Humberto Sánchez v. Honduras*, 2003, para 186; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights,* 224 f.

1196 IACtHR, *Velásquez-Rodríguez v. Honduras (Merits)*, para 135; HRCom, *Hiber Conteris v. Uruguay*, A/40/40, 139/1983, 1985, para 7.2.

1197 See above, B.III and below, H.

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possible and proportionate, states must overcome those barriers or at least diminish them.[1198] Also, states must give survivors adequate protection to enter the program. Often, survivors continue to live in conflict-affected zones or are subject to threats if they try to present their claim.[1199] While states cannot remove all barriers, they must do everything that can reasonably be expected to ensure survivors a real and practical opportunity to enter the reparation program without discrimination. This standard requires the state to consider the differing needs and vulnerabilities within the survivor population.

E. Content of Reparation Programs

The reader's most pressing question probably does not concern whom to repair but how. How do you adequately repair violations of such gravity and magnitude as required in the transitional situation? Many suggest that this enormous task warrants new concepts. As will be shown below, it is more convincing to keep the standards of chapter one.[1200] Hence, the international law on reparation demands that reparation in transitional justice be comprehensive, complete, and full. While certainly a noble position, it seems impossible to square with reality. The reparation programs chapter two examined had enough difficulties repairing a limited number of survivors, and they did not even come close to providing full reparation. Making them genuinely comprehensive, complete, and in line with the full reparation standard would surely overwhelm their administrative and financial capacities for good.[1201] The problem is even more profound. Comprehensive, complete, and full reparation in transitional justice could not only overwhelm reparation programs but the state as a whole. Full reparation easily results

1198 OHCHR, *Reparation Programmes*, 17; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 15; UNGA, *Basic Principles*, A/RES/60/147, para 11(c), 12(b); IAComHR, *Access to Justice*, OEA/Ser.L/V/II.129, para 5, 8, 81 ff.; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle K(a), (d); UNDP, *Access to Justice*, 138 f.; van Rooij/van de Meene, *Access to Justice and Legal Empowerment*, 10 f.

1199 Illustrative, although in the context of the right to access the then still existing EComHR, ECtHR, *Kurt v. Turkey*, 24276/94, para 160. Of course that obligation can also arise independently based on states' general obligation to respect, protect and ensure human rights, see generally UNGA, *Basic Principles*, A/RES/60/147, para 10.

1200 See below, E.I.

1201 There might be examples in which that is not the case, especially if systematic human rights violations affected a limited subsection of the population only. Canada's residential school system could be a case in point here.

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in individual compensation for grave human rights violations surpassing 100.000 USD, not even accounting for additional restitution, rehabilitation, satisfaction, and guarantees of non-repetition. If all survivors of systematic grave human rights violations received such sums while survivors of minor violations also received reparation, the claims could surpass a state's gross domestic product (GDP).[1202] Obviously, reparation should not endanger states' functionality. So how can this mismatch between the possible input and the demanded output be bridged? After arguing that full reparation should remain the standard for transitional justice (I.), the following sections attempt to defuse the situation on three levels: First, they elaborate standards according to which states can finance reparation programs and limit their financial scope (II.). Second, they establish rules governing the internal distribution of limited resources among survivors (III.). Third, they discuss norms on devising adequate reparation measures, which redress the harm suffered with the limited budget available (IV.).

I. Defending Full Reparation

Many scholars argue that full reparation is not suitable for transitional justice.[1203] This claim is more consequential than the argument above that an interpretation of the international law on reparation needs to consider transitional justice's transformative aim.[1204] While the latter leads to a modest adaptation, replacing full reparation would lead to a transitional-justice-specific reparation concept. There is some evidence in practice for this

1202 Roht-Arriaza/Orlovsky, *Reparations and Development*, 173. In the reparation award in the Massacre of Plan de Sanchez Case against Guatemala the IACtHR awarded reparation, worth 7.9 million USD. The massacre was one out of the 626 documented by the TRC. Assuming that 7.9 million USD is the average reparation due, Guatemala would owe almost 5 billion USD to survivors of massacres alone, Sandoval, *Two Steps Forward, One Step Back*, 1194. By the time the judgment was rendered in 2004, this would have amounted to more than a fifth of the country's GDP, https://data.worldbank.org/country/guatemala. Making similar calculations for Peru, de Greiff arrives at a figure worth two thirds of Peru's annual budget, de Greiff, *Justice and Reparations*, 159. For further examples see ILA, *Reparation for Victims of Armed Conflict*, e.g. 321. Of course, states often claim a lack or resources simply to avoid their obligation. This should not serve as a pretext for such claims, HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 51 ff.

1203 See the sources in this section on transformative reparation.

1204 See above, B.I.

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more radical approach.[1205] Yet, it rests on the mistaken assumption that the international law on reparation cannot guide transitional justice reparation efforts since the volatile circumstances and the number of survivors make full reparation impossible.[1206] This view is based on a wrong interpretation of full reparation. The PCIJ stated in the Chorzów Factory Case that reparation must wipe out the consequences of an illicit act *as far as possible*. The principle of full reparation requires optimization, not complete fulfillment at all costs. Accordingly, human rights courts regularly apply the concept of full reparation to situations where it cannot be fulfilled, like torture cases.[1207]

A challenge gaining more traction is that full reparation's conservative character produces unjust results in transitional justice. Full reparation requires putting the survivor in the position that would exist had the violation not occurred. Transitional justice situations usually arise out of unjust circumstances, including structural discrimination, poverty, and insecurity. Since full reparation requires the forward projection of the status quo ante, it likely reproduces these unjust circumstances.[1208]

In response, an alternative vision of reparation in transitional justice promises relief: transformative reparation. Instead of assessing and redressing

1205 IACtHR, *Yarce et al v. Colombia*, para 326; IACtHR, *Cotton Field Case*, para 450.; ICC, *Lubanga Reparations Order (Appeals Decision)*, ICC-01/04-01/06-3129, para 17; ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 44, 94 f. An overview over practice and scholarship defending the concept is given by Walker, *Transformative Reparations? A Critical Look at a Current Trend in Thinking About Gender-Just Reparations*, 2015 Intl. J. Transitional Just. 10(1), 108, 112 ff.

1206 Hamber, *The Dilemmas of Reparations - In Search of a Process-Driven Approach*, in: de Feyter et al. (eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations,* 2005, 135, 136 f.; de Greiff, *Justice and Reparations*, 158 ff.

1207 CAT, *GC 3*, CAT/C/GC/3, para 6 ff.

1208 Yepes Uprimny, *Transformative Reparations*, 633 f.; Duggan/Jacobson, *Reparation of Sexual and Reproductive Violence - Moving from Codification to Implementation*, in: Rubio-Marin (ed.), *The Gender of Reparations - Unsettling Sexual Hierarchies While Redressing Human Rights Violations,* 2009, 121, 154; Couillard, *The Nairobi Declaration - Redefining Reparation for Women Victims of Sexual Violence*, 2007 Intl. J. Transitional Just. 1(3), 444, 444, 450 f.; Manjoo, *Introduction - Reflections on the Concept and Implementation of Transformative Reparations*, 2017 Intl. J. Hum. Rts. 21(9), 1193, 1197 ff.; Rubio-Marín/Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights - The Promise of the "Cotton Field" Judgment*, 2011 Hum. Rts. Q. 33(4), 1062, 1070; McLeod, *Envisioning Abolition Democracy,* 1646. Most of the cited authors employ a slightly different full reparation standard, requiring the establishment of the situation that existed before the violation occurred. For a repudiation of that standard see above, ch. 1, C. The reproduction of unjust circumstances in the status quo ante will be similar with both approaches.

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individual harm, transformative reparation shall change the unjust background conditions that led to the violations. These include structural discrimination, poverty, and others.[1209] While highlighting a critical weakness of full reparation, this exclusive focus on societal transformation carries the danger that individual claims to justice become secondary or disregarded. Survivors have a robust and specific claim against the state based on its wrongdoing. Absorbing those claims in the pursuit of societal transformation would not do justice to the individual violation. As Walker put it: "the resulting 'reparations' […] may bypass or instrumentalize harmed individuals and groups by treating them as symptoms of a more serious and important justice issue".[1210] In that case, reparation would lose its character as an instrument of individual justice. Experience in transitional justice situations – not least the ones chapter two examined – shows that sidelining individual justice caused survivors frustration and anger, allowed states to evade their reparation obligation, and, ultimately, undermined reparation's legitimacy.[1211] The concept of transformative justice provides little guidance to reign in these concerns. It rarely goes beyond a rough policy proposal. From a legal perspective, it conflates the obligation to repair with other legal obligations, e.g., to progressively realize economic, social, and cultural rights, end discrimination, and fulfill human rights. These obligations have their distinct dogmatics, which are better suited to guide the societal transformation necessary in transitional justice. Their focus on structures rather than individuals better allows them to grasp the specific problems at play. Other transitional justice measures with a stronger focus on society, such as truth commissions or institutional reform, are better placed to achieve that task.[1212]

1209 Yepes Uprimny, *Transformative Reparations*, 637 f.; Duggan/Jacobson, *Reparation of Sexual and Reproductive Violence*, 154; Couillard, *The Nairobi Declaration*, 450 f.; Manjoo, *Introduction*, 1197 ff.; Rubio-Marín/Sandoval, *Engendering the Reparations Jurisprudence of the IACtHR*, 1070.

1210 Walker, *Transformative Reparations?*, 123. A similar argument is forwarded by Moffett, *Reparations for Victims at the International Criminal Court - A New Way Forward?*, 2017 Intl. J. Hum. Rts. 21(9), 1204, 1212 f.

1211 Laplante, *Transitional Justice and Peace Building - Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2008 Intl. J. Transitional Just. 2(3), 331, 352; Yepes Uprimny/Saffon, *Reparaciones Transformadoras, Justicia Distributiva y Profundización Democrática*, in: Díaz et al. (eds.), *Reparar en Colombia - Los Dilemas en Contextos de Conflicto, Pobreza y Exclusión,* 2009, 31, 48 ff.

1212 Laplante, *Transitional Justice and Peace Building*, 333.

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Notwithstanding transformative reparation's weaknesses, searching for reparation's transformative potential in light of unjust societal circumstances deserves credit and consideration. Fortunately, this is one of the rare situations in which one can have the cake and eat it too – at least partially. Many transformative reparation proponents underestimate both the fruitfulness and adaptability of the full reparation approach in transitional justice situations. Its detailed examination can address concerns without abandoning well-established reparation standards that ensure that individual claims are not sacrificed on the altar of societal transformation.

At the core of the transformative reparation approach lies the interpretation of the right to reparation as requiring the reproduction of unjust circumstances. However, when viewed as part of the human rights system and in light of the object and purpose to realize all human rights, that interpretation of the right to reparation is implausible. Reparation does not override other human rights obligations. The state must fight discrimination, poverty, and structural violence under its obligation to not discriminate, progressively realize economic, social, and cultural rights, and fulfill human rights. It has numerous options to realize those rights aside from reparation, and it continues to have those obligations when devising and implementing reparation programs. The state must take great care that reparation does not cause further human rights violations. Most importantly, it must adhere rigorously to the prohibition of discrimination.[1213] This interplay between the right to reparation and other human rights often requires that reparation actively addresses unjust structures. For example, the Moroccan reparation program disregarded national inheritance law when setting compensation for deceased victims' family members because the law accorded women a smaller share.[1214] Arguably, the obligation not to discriminate forced the Moroccan state to design reparation that way. Admittedly, this falls behind the transformative project. In this scenario, reparation is not intended to overcome societal injustice. It "just" avoids its reproduction. But overcoming societal injustice might very well enter the concept of full reparation. As

1213 IACtHR, *Cotton Field Case*, para 451; Walker, *Transformative Reparations?*, 121 ff. While that sounds like a point too obvious to make, it is highly difficult to create non-discriminatory reparation programs, as a wealth of literature especially from feminist scholarship teaches. See for example Rubio-Marín, *The Gender of Reparations*; Manjoo, *Introduction*, 1194.

1214 Rubio-Marín, *Introduction - A Gender and Reparations Taxonomy*, in: Rubio-Marin (ed.), *The Gender of Reparations - Unsettling Sexual Hierarchies While Redressing Human Rights Violations,* 2009, 1, 17.

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mentioned before, teleological considerations require taking the broader transformational aim of transitional justice into account when interpreting the international law on reparation. Beyond that, the distinct nature of harm in transitional justice situations affects the implementation of full reparation in transitional justice. Systematic human rights violations affect whole sectors of society and often society as a whole. As the case studies evinced, systematic violations knit a complicated web, in which individual harm interacts with previous injustices, ongoing discriminatory structures, and the damages other individuals, communities, and society suffered. Most obviously, this is the case for survivors of sexualized violence. Sexualized violence in conflict is often enabled and furthered by previous gender discrimination. Gendered stereotypes, e.g., of unmarriageability or the alleged purity of women, cause or exacerbate the shame, stigma, and ostracism such survivors often experience.[1215] The violation thus causes direct harm and indirect harm through its interactions with discriminatory social dynamics. To thoroughly repair both, working with communities on such discriminatory structures is indispensable. Equal considerations pertain to the reparation of other groups of survivors. Survivors of forced amputation in Sierra Leone suffered exacerbated discrimination and poverty because of their disability.[1216] Remedying their harm also requires ending ableist discriminatory patterns and creating employment opportunities for the disabled.

Thus, a rigorously applied full reparation framework will often require the transformation of previous injustices and discriminatory structures. Still, the two concepts are not the same. The concerns proponents of transformative justice raise enter the full reparation framework only through the backdoor of individual redress. That is fundamentally different than making them the primary objective of reparation. Full reparation does not serve to cure ailments of society. All measures must still be connected to the harm individual survivors suffered. They will fail to address some unjust conditions. Notwithstanding, full reparation can accommodate the transformative logic of reparation in transitional justice the case studies identified.[1217] What falls through the cracks in this approach should not be caught by an excessive account of what reparation can and should do. Instead, one should rely on what is already there: General obligations under international human rights

1215 Duggan/Jacobson, *Reparation of Sexual and Reproductive Violence*, 128 ff. See above, ch. 2, B.II.
1216 See above, ch. 2, B.II.
1217 See above, ch. 2, E.

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law and their interaction with reparation, as well as other transitional justice measures, which are better suited to the task.

II. Input: Setting the Financial Scope of the Program

The adherence to the concept of full reparation will firmly put many states in the bind described above. The demands of comprehensive, complete, and full reparation can be so far removed from their financial abilities that finding a normative basis for limiting them is imperative. A normative conflict perspective helps develop such a normative basis: Setting the scope of a reparation program can confront the state with a normative conflict. If they had to spend a large part of their finite budget for reparation, they could encounter difficulties fulfilling other essential functions – healthcare, education, maintaining public order, etc. Since these functions are subject to different human rights and legitimate interests, the state cannot simultaneously fulfill its obligations under the right to reparation and other human rights to the full extend. The following section looks at different strategies to approach this conflict. It first looks at possibilities to increase the size of the pie. A state's budget is finite but not fix. The state can raise resources internally to meet heightened demands (1.) or enlist external support (2.). States can make the conflict less pressing by seeking synergies between reparation and other obligations (3.). While all strategies have their merits, they cannot solve the problem at hand. States cannot simply be obliged to raise the resources necessary. It would often be too much of a burden, and states' economic policy remains their sovereign prerogative. They cannot be allowed to rely on external support to the degree necessary, as that would amount to outsourcing reparation, stripping it of its roots in state responsibility. Seeking synergies cannot solve the problem either, as it also endangers the character of reparation and risks turning it into assistance. Hence, there is no way to avoid the normative conflict between the right to reparation and competing international obligations entirely. Limiting the financial scope of reparation programs remains inevitable. Accordingly, the study will develop a process through which the normative conflict can be solved. It will structure the required balancing act by using Alexy's Weight Formula (4.).[1218] Taken together, these sections will bridge the gap between states' financial capabilities and the exacting demands of full reparation.

1218 See above, B.2.b.

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1. Raising Resources

When facing increased demand, states can make policy choices to raise revenue and other resources.[1219] International practice came up with a multitude of options to do so specifically for reparation in transitional justice.[1220]

Economic policy belongs to the core of states' domaine réservé. International law has little to say about how states raise and spend resources. However, save in highly exceptional circumstances, international law does demand that states have the money to discharge their international obligations.[1221] Also, states must seize any reasonable opportunity to avoid normative conflict or make it less pressing.[1222] Since reparation is an international obligation and confronts states with a normative conflict, they must do everything that can be reasonably expected to raise the resources necessary for reparation. Because the choice on how to do that remains states' sovereign prerogative, legal oversight of that matter will and must be limited. The debate about how to assess whether states used their maximum available resources to realize economic, social, and cultural rights can help determine an adequate level of scrutiny. This standard similarly requires states to raise resources for obligations whose complete and immediate fulfillment could overwhelm their capacities. States enjoy a wide margin of appreciation in determining how much resources they raise for that purpose. In addition to looking at the available resources, oversight should concentrate on whether the state's policy choices reflect a sense of importance for the relevant rights.[1223] Thus, states can be obliged to raise resources through means of their choice. However, the

1219 AU, *Transitional Justice Policy,* 2019, para 66(v).

1220 OHCHR, *Reparation Programmes*, 32; HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 57 f.; AU, *Transitional Justice Policy,* 2019, para 130 ff. In general see Segovia, *Financing Reparations Programs - Reflections From International Experience*, in: de Greiff (ed.), *The Handbook of Reparations,* 2006, 650.

1221 See the short discussion of economic necessity and why it does not apply to most transitional situations, above, ch. 4, A.II.

1222 See above, B.II.2.a.

1223 Alston/Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 1987 Hum. Rts. Q. 9(2), 156, 180 f.; Robertson, *Measuring State Compliance With the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights*, 1994 Hum. Rts. Q. 16(4), 693, 697 ff. For a similar criterion in the context of reparation in transitional justice, Antkowiak, *Remedial Approaches to Human Rights Violations – The Inter-American Court of Human Rights and Beyond,* 2008 Colum. J. Transntl. L. 46(1), 351, 400 f.

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costs of comprehensive, complete, and full reparation can be too great to be within the reach even of ambitious domestic financial policies. The strategy of domestically raising resources alone does not suffice.

2. Enlisting External Support

A strategy often employed to raise resources for reparation is to enlist external support. Many states rely on NGOs, foreign states, international organizations, or other actors to partially fund or administrate their reparation program. Apart from increasing the resources available for reparation, this strategy can also avoid creating double structures and make reparation more effective by entrusting their implementation to actors with experience in that area and sometimes an existing relationship with beneficiaries. At the same time, third-party assistance also risks changing the character of the benefit given. It raises the problem of authorship. A prime example is Sierra Leone. International monetary aid started the entire program. Its implementation relied to more than 50 % on international funds. The first years of the program were funded almost entirely by third actors. International organizations implemented many measures at their costs, and the program co-opted existing NGO-programs, declaring them as reparation without lending decisive support. The extreme example raises the question of whether the state can discharge its obligation to repair without providing the resources for reparation.

a. Funding the Program

The point of departure for answering that question is the definition of reparation as an arithmetic operation rooted in state responsibility, through which *the responsible state* gives the survivor a benefit in acknowledgment of its wrongdoing.[1224] Benefits other entities provide are based on solidarity, not responsibility, and therefore constitute assistance, not reparation.[1225] If

1224 ECtHR, *Scordino v. Italy (No. 1)*, 36813/97 (Grand Chamber), 2006, para 199. See above, Introduction, C.

1225 HRC, *Report of the Special Rapporteur on Transitional Justice*, A/HRC/30/42, para 11. Rombouts et al., in contrast, forward that reparation can be based on solidarity, as from the viewpoint of the survivor, it does not matter, whether adverse effects on their human rights are based on responsibility or, e.g. natural disasters and that it is hence equally compelling morally to repair both kinds of survivors, Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Human Rights Viola-*

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anyone could provide reparation, its secondary purposes – condemnation, retribution, and deterrence – would be ineffective. The message of validity, applicability, enforceability, and importance of human rights would be less credible since the communicating entity is not responsible for violations. The messenger would not be the one who must regain trust. Hence, in principle, the state must provide benefits and acknowledge its responsibility to discharge its obligation to repair. Consequently, if the state merely acts as an interchangeable distributor of external resources, such distribution cannot qualify as reparation.

On the other hand, it would be apposite to the standards established to entirely disallow external contributions to reparation programs. States must raise resources for reparation and use them as effectively as possible to repair survivors.[1226] If external resources were readily available for that purpose, obliging the state to reject them would run counter to those principles. Also, external resources are indispensable for some reparation measures, such as the restitution of objects only available in other countries.

As a result, neither an absolute ban on external resources is justifiable, nor can the responsible state assume a completely interchangeable role as the mere distributor of someone else's funds. In an overall assessment of the respective program, the state's involvement must be so substantial that the benefits it distributes can be qualified as given by the state. The assessment cannot only look at the state's share of the program's costs. Its substantial involvement can also stem from fundraising efforts, planning and implementing the program, or other organizational, operational, strategic, or administrative tasks. This case-by-case assessment applies to the reparation program as a whole and single reparation measures. Each measure must constitute reparation to be a legitimate part of a reparation program. A state cannot offset a minor role in one program part by being more involved in others.

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tions, 497 f. This, however, does not take into account that states can be obliged to support survivors of, e.g., natural disasters based on their positive human rights obligations. It also seems questionable, whether there really is no difference between survivors of human rights violations based on state responsibility and survivors of natural disasters, as the latter do not comprise a deliberate action on part of the entity responsible. Hence, suffering from such events is even more the result of chance. Where it is not (or not exclusively), for example in case of environmental racism, state responsibility can be established, putting the harm back into the realm of reparation. On environmental racism see Johansen, *Environmental Racism in the United States and Canada – Seeking Justice and Sustainability,* 2020, 1 ff.

1226 See above, E.II.1., 3.

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Three scenarios can be distinguished in the application of this standard to the real world. The authorship problem does not arise when the state funds the reparation program with external resources that flow into its general budget.[1227] In that case, the state chooses to allocate resources at its free disposal for reparation, making it a benefit from the state. Authorship becomes questionable if the state relies on external funds, specifically earmarked for the reparation program. Here, the abovementioned case-by-case assessment comes into play. Lastly, states often recover assets from other perpetrators. In Colombia, assets collected from the FARC-EP flowed into the reparation program.[1228] The SLTRC recommended a range of measures to hold non-state actors accountable, e.g., through asset seizure. The originally envisaged reparation program was to include some of these measures.[1229] Fines the ICC orders perpetrators to pay can also flow into reparation efforts.[1230] The Philippines financed part of their reparation program through asset recovery proceedings abroad.[1231] These forms of using other perpetrator's assets to fund the reparation program can take the form of both scenarios discussed above. In principle, another actor's responsibility does not relieve a state from its responsibility for the entire harm sustained because of a violation of international law.[1232] In human rights law, the state is fully responsible for private individuals' acts, if these are attributable or if the state failed to prevent them. The state, therefore, remains accountable to provide full reparation to the survivor even if a private individual contributed to the human rights violation or committed it.[1233] From this perspective, the state cannot rely

1227 See for the example of The Philippines, Carranza, *Plunder and Pain*, 324 f.; Davidson, *Alien Tort Statute Litigation and Transitional Justice - Bringing the Marcos Case Back to the Philippines*, 2017 Intl. J. of Transitional Just. 11(2), 257, 266 ff.

1228 Íñigo Álvarez, *The Obligation to Provide Reparations by Armed Groups - A Norm Under Customary International Law?*, 2020 Netherlands Intl. L. Rev. 67(3), 427, 439 f.

1229 See above, ch. 2, B.IV.2.b. and SLTRC, *Witness to Truth*, vol. 2, para 224 ff.

1230 For details on these examples see above, ch. 2, D.II. and Moffett, *Transitional Justice and Reparations*, 389 f.

1231 Carranza, *Plunder and Pain,* 324.

1232 ILC, *ASR Commentaries*, A/56/10, art. 31, para 12 f.; *D. Earnshaw and Others (Great Britain) v. United States (Zafiro Case)*, R.I.A.A. VI, 1925, 160, 164 f. In case of co-responsibility of a plurality of states, the law is less clear, ILC, *ASR Commentaries*, A/56/10, art. 47 para 4 ff. The ICJ left that question open in ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment,* I.C.J. Reports 1992, 240, para 48, 56.

1233 IACtHR, *Ximenes-Lopes v. Brazil*, 2006, para 232; The IACtHR and ECtHR award full reparation also for violations of positive obligations, IACtHR, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil*, 2020,

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on perpetrators' assets to provide reparation any more than it can rely on other third parties' assets for that purpose. However, the communicative content of the two scenarios differs. When using perpetrators' assets, the state shows its dedication to enforcing human rights in private relationships. This is essential to achieve the transitional-justice-specific aim of creating generalized horizontal trust.[1234] More generally, retrieving assets from other perpetrators can communicate the validity, applicability, importance, and enforcement of human rights, whereas relying too heavily on other actors risks undermining that message by suggesting that the state seeks to avoid its obligation. Out of this consideration, it seems justified to allow the state to rely to a greater degree on assets recovered from perpetrators than on contributions from third parties.

In each scenario discussed above, it remains essential that the state does not use the reliance on other parties' assets as a pretext to absolve itself from responsibility for the violation. A benefit only constitutes reparation if accompanied by an acknowledgment of wrongdoing – regardless of where the resources come from.

b. Running the Program

Apart from using external funds for the program, states also rely on outside actors to run it. This can produce synergy effects and contribute to the efficient use of limited resources. After all, why should the state set up its own psychological rehabilitation program if an experienced NGO has worked with survivors for years? Accordingly, ample transitional justice state practice and human rights jurisprudence rely on third parties to provide specific reparation measures.[1235] To preserve the reparatory character of the

115 ff., 257 f.; ECtHR, *Berkman v. Russia*, 46712/15 (Third Section), 2020, operative para 7, in which the court awards the 10.000 € claimed by the applicant regardless of the contributions of private actors to the violation. On the normative basis for state responsibility with more details on potential concurrent responsibility and causation see above, Ch. 1 B.III.

1234 See above, ch. 3, C.III.

1235 CEDAW, *V.K. v. Bulgaria*, CEDAW/C/49/D/20/2008, 20/2008, 2011, para 9.16(b)(iii); IACtHR, *Rosendo Cantú et al. v. Mexico*, para 253; ICC, *Information Regarding Collective Reparation,* ICC-01/04-01/06-3273, para 54; Cammack, *Reparations in Malawi*, 229 f.; Guembe, *The Argentinean Experience*, 33; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 68 f.; ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste*, 13; UN Women, *The Conflict did not Bring us*

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benefits, the same considerations apply as above. The state must contribute substantially, e.g., by paying for the program's continuation, extension, or making it free for survivors. The state must acknowledge that it supports the implementing partner because of its responsibility for the human rights violation in question. It must ensure that this acknowledgment reaches the survivors who benefit from the measure in question.

Relying on external support can ease the normative conflict by increasing the resources available for reparation and creating synergies with existing programs. The strategy cannot solve the normative conflict between reparation and other interests and obligations, though.

3. Efficiency: Seeking Synergies

Similar problems arise from another strategy states often use to make the normative conflict between the right to reparation and competing claims less pressing. Generally, states are obliged to devise reparation measures as efficiently as possible. That reduces the normative conflict between the right to reparation and other rights and interests because states achieve more reparative effects with the same amount of resources. To accomplish that, states often seek synergies between reparation and assistance. They provide non-excludable goods as collective and service-based reparation from which survivors and the general population profit.[1236] That way, the state can simultaneously fulfill its obligation to repair survivors and its various obligations towards the general population. For example, instead of paying survivors' medical expenses, states can build a hospital, which caters to survivors and the general population. On the downside, the provision of non-excludable goods

Flowers - The Need for Comprehensive Reparations for Survivors of Conflict-Related Sexual Violence in Kosovo, 2016, 32; Sharma et al., *From Relief to Redress*, 25, 26; Guillerot, *Reparations in Peru*, 41; Statute of the Trust Fund for Victims of Hissène Habré's Crimes, art. 21(2); ECOSOC, *Pinheiro Principles*, E/CN.4/Sub.2/2005/17 Annex, principle 12.5.

1236 Dixon, *Reparations, Assistance and the Experience of Justice - Lessons From Colombia and the Democratic Republic of the Congo*, 2015 Intl. J. Transitional Just. 10(1), 88, 88 f.; Duthie, *Toward a Development-Sensitive Approach to Transitional Justice*, 299 ff.; Roht-Arriaza/Orlovsky, *Reparations and Development*, 182 ff. See generally on the synergy effects between transitional justice and development, Carranza, *Plunder and Pain*, and the other contributions to the special issue of the journal as well as, Arbour, *Economic and Social Justice for Societies in Transition*; de Greiff/Duthie (eds.), *Transitional Justice and Development: Making Connections,* 2009.

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makes these measures hard to distinguish from assistance.[1237] Blurring the line between reparation and assistance comes with risks. When acting in bad faith, states can "do what [they] should be doing anyway and slap a reparations label on it."[1238] They can seek to avoid their obligation to repair. Colombia did as much when retroactively labeling assistance as reparation.[1239] But even reparation programs enacted in good faith can produce confusion between reparation and assistance. If no clear line divides the two, access of the broader population to reparation measures can delegitimize the program in survivors' eyes.[1240] A clear distinction between reparation and assistance is thus vital to enjoying the benefits of linking the two. Three cumulative criteria serve that purpose. The first two derive from the definition of reparation. Reparation is a benefit given by the responsible state to the survivor in acknowledgment of wrongdoing to remedy the harm caused.[1241] Thus, a benefit a state gives to a survivor can only constitute reparation if it relates to the damage they suffered and is accompanied by an acknowledgment of responsibility.[1242] The state must acknowledge responsibility at the moment it delivers reparation.

1237 OHCHR, *Reparation Programmes*, 26. On the obligation to distinguish, IACtHR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, 2012, para 350.

1238 Roht-Arriaza/Orlovsky, *Reparations and Development*, 192.

1239 See above, ch. 2, C.IV.

1240 All case studies in ch. 2 attest to that fact. The risk is heightened, if perpetrators have access to reparation measures. That was one of the key reasons for the withdrawal of 43 survivors from the Ruto and Sang case before the ICC, ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Common Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims From the Turbo Area by Letter Dated 5 June 2013*, ICC-01/09-01/11-896-Corr-Red (TC V(A)), 2013, para 12. Generally on the problem in practice see Beristain, *Diálogos Sobre la Reparación – Experiencias en el Sistema Interamericano de Derechos Humanos,* Vol. II, 2008, 508 ff. Of course, in most transitional contexts, no neat line divides survivors and perpetrators, see above, C.II.1.

1241 See above, Introduction, C.

1242 OHCHR, *Reparation Programmes*, 25 f.; HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 30; Rubio-Marín, *The Gender of Reparations - Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, 2009, 109 f.; Yepes Uprimny, *Transformative Reparations of Massive Gross Human Rights Violations - Between Corrective and Distributive Justice*, 2009 Netherlands Q. Hum. Rts. 27(4), 625, 645; HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 11; Schotsmans, *Victims' Expectations, Needs and Perspectives After Gross and Systematic Human Rights Violations*, 114 f.; ECtHR, *Scordino v. Italy (No. 1)*, 36813/97, para 180; Dixon, *Reparations, Assistance and the Experience of Justice*, 95 ff. While Dixon remarks that recognition can sometimes be harmful to survivors, this conflates different meanings of the term. Public recognition of individuals as survivors can be harmful, e.g. if they are survivors of sexualized violence.

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A retroactive declaration cannot magically turn assistance into reparation. It would constitute a bad faith performance of the obligation to repair.[1243]

Third, the relationship between reparation and positive human rights obligations distinguishes reparation from assistance. Reparation is something a *survivor* deserves because of the wrongdoing they suffered. It is unrelated to what that person deserves as a *member of society*, namely the progressive realization of economic, social, and cultural rights and the fulfillment of human rights. If a state owes a benefit under the latter, it cannot be treated as reparation because the survivor would be entitled to it anyway.[1244]

The demands of that requirement vary with the degree of realization of rights in the respective society. In a community where only primary health care is available, specialized services for survivors can be a reparation measure. If a robust health care system exists, progressively realizing the right to health might require that specialized services are available to the population, making them ineligible as a reparation measure. When discharging their positive obligations under human rights law, states must pay special attention to vulnerable and marginalized sectors of the population.[1245] Survivors often belong to these sectors, making it harder for the state to deliver reparation instead of the benefits survivors are entitled to as persons under the state's jurisdiction.

While this sounds clear-cut in theory, it can become muddy in practice. Some reparation measures cannot realistically be provided just to survivors. It would be inhumane and create unbearable community tensions if a health center established to deal with survivors' medical needs refused treatment to anyone else. Especially for collective and service-based reparation, complete exclusivity is simply no option. How then can the distinguishing features

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However, what is required is not public but personal recognition towards the survivor. Whether it is made public or not is not decisive.

1243 The principle of good faith obliges parties to a treaty to act honestly and fairly, disclose their motives and take into account the fair expectations of the other party and other relevant actors, Kotzur, *Good Faith (Bona Fide)*, in: Wolfrum (ed.), *Max Planck Encyclopedia of International Law,* Online Edition 2009, para 20. Retroactive declarations are a form of evading the obligation to repair and fail to consider the legitimate expectation of survivors that they receive actual benefits as reparation and not only a declaration that what they already have constituted reparation.

1244 Rubio-Marín, *The Gender of Reparations*, 179, 192; Roht-Arriaza/Orlovsky, *Reparations and Development*, 109 f.; HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 41.

1245 CESCR, *General Comment No. 3 - The Nature of States Parties' Obligations,* E/1991/23, 1990, para 12.

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elaborated above be secured? To answer that question, this section needs to delve shortly into the topic of the next one, the design of adequate reparation measures. States use three common strategies to distinguish between reparation and assistance: Prioritization, specialization, and deduction.[1246]

Survivors can receive priority access to services not generally available to the population. If, for example, primary healthcare is not generally accessible, the state can establish health centers first in areas with large survivor populations or implement a referral system specifically for survivors. Specialization refers to the provision of services tailored to the specific harms survivors suffered.[1247] Sierra Leone, for example, provided fistula surgery for survivors of sexualized violence. In the realm of education, it gave courses specifically tailored to the needs of survivors. Lastly, the deduction strategy offers generally available benefits at cheaper rates or free of charge to survivors.

Some authors doubt the validity of the prioritization strategy because the benefit survivors receive is not the measure as such, but receiving it earlier than the general population.[1248] Upon closer inspection, the criticism can be leveled against any of the three strategies, although some authors present the latter two as alternatives to the former. The progressive realization of human rights at one point requires states to provide specialized services to their population and many benefits for free.[1249] Of course, many states in transition are far removed from being obliged to do that. Nevertheless, the time element

1246 Examples for the prioritization strategy are Asamblea Nacional de Nicaragua, Ley de Atención Integral a Víctimas, art. 2; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 69, 70 (also an example for the discount strategy); Presidente de la República de Perú, Decreto Supremo 047-2011-PCM, art. 18(b), 19(d), (e) (also an example for the discount strategy). Examples for the specialization strategy can be found in Guillerot, *Reparations in Peru*, 39 f. (also an example for the discount strategy); General Congress of the United Mexican States, General Victims Act, art. 68(I); Examples for the discount strategy beyond those already mentioned are, Congreso Nacional de Bolivia, Ley 2640, art. 6; Asamblea General de Uruguay, Ley No 18.596, art. 10.

1247 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 41 f.; OHCHR, *Reparation Programmes*, 26 f.

1248 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 41 f.; OHCHR, *Reparation Programmes*, 26 f.

1249 To give an example, the progressive realization of the right to education requires at some point that primary, secondary and higher education be made free of charge and the right to health requires the availability of specialized services, CESCR, *General Comment No. 22 on the Right to Sexual and Reproductive Health,* E/C.12/GC/22,

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provides no principled distinction between the prioritization, specialization, and deduction strategy.

Receiving benefits earlier than the general population can have reparatory value. Since many damages persist or even intensify over time, earlier mitigation measures limit the injury sustained. The reverse situation evinces that: Human rights courts and treaty bodies factor in the time of suffering when determining the amount of damage sustained.[1250] If the time survivors wait for reparation aggravates their harm, receiving a measure alleviating it earlier must be a benefit. Still, if an action was required imminently as a progressive realization of the population's rights, extending it to survivors shortly before does not seem to be of much value. Accordingly, all three strategies' reparative value comes down to how far removed the benefit is from being a positive obligation towards the general population. If the state extends a benefit to survivors five years earlier than it is obliged to provide it to the general population, it has a reparatory function. If it is 20 years, it has a considerable reparatory function. At some point towards the lower end of the scale, where the benefit must be provided imminently to realize the general population's rights, delivering it to survivors shortly beforehand will seize to have a reparatory function at all.

In sum, the three strategies of prioritization, specialization, and deduction can help distinguish between reparation and assistance. To make the distinction as sharp as possible, all three strategies should be employed cumulatively and accompanied by an unequivocal acknowledgment of wrongdoing.

4. Broad Balancing

The standards discerned so far detail the supply-side of reparation in transitional justice: States must raise resources to a certain degree to comply with their obligation to repair, both internally and externally. However, they cannot be obliged to increase resources and are not allowed to rely on external support to the degree necessary to finance comprehensive, complete, and full reparation.[1251] While they can and must seek synergies between reparation

2016, para 12 f.; CESCR, *General Comment No. 13 - Right to Education,* E/C.12/1999/10, 1999, para 6(b)(iii).

1250 IACtHR, *Fernández Ortega et al. v Mexico*, para 293.

1251 This should not detract from the fact that, if political will exists, astonishing sums can be spent on reparation. A striking and shameful example is a large-scale reparation program from Great Britain in the context of outlawing the slave trade –

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and the fulfillment of other obligations, they will not be able to evade the normative conflict between the right to reparation and other rights and interests entirely. For that, the conflict is too severe. Instead, the demand-side of reparation in transitional justice warrants attention: Limiting the financial scope of reparation programs becomes inevitable. As mentioned above, a normative conflict perspective justifies doing so. If the aggregated claims to reparation overwhelmed the state's resources, it would have difficulties to fulfill its other essential functions. These functions not only serve legitimate state interests but also meet the human rights of other persons. A normative conflict ensues, which can be resolved with the tools established above, especially balancing.[1252]

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for slave *owners* for their "lost property". It cost twenty million pounds, which amounted to 40 % of Great Britain's GDP at the time. Today the same share of the GDP would be worth 100 billion pounds. Great Britain paid of the loans needed for the program until 2015, Andrews, *The New Age of Empire*, 56 f.

1252 There is sparse international practice recognizing this conflict and its possible solution through balancing, most importantly the EECC, *Final Award*, para 18 ff., and, with much more caution, ICJ, *Armed Activities Reparations,* para 110, 407. Both bodies ultimately found that they did not need to decide on that issue, because no conflict actually arose in the cases at hand. The ICJ explicitly left the question open, whether this reasoning could require a deduction of the amount of reparation due. The EECC rejected moral damages, also mentioning "Eritrea`s limited economic capacity", EECC, *Final Award,* para 61. The UNSC was also mindful of the "requirements of the people of Iraq, Iraq's payment capacity [and] the needs of the Iraqi economy" when establishing the United Nations Claims Compensation Commission, UNSC, Resolution 687 (1991), S/RES/687 (1991), 1991, para 19. These two mechanisms occupy a unique place in between inter-state post-war reparation mechanisms and those addressed at individuals, which might explain this concern, Günnewig, *Schadensersatz Wegen der Verletzung des Gewaltverbotes als Element Eines Ius Post Bellum,* 2019, 216 ff., 293 ff., 380 f. For an analysis of this practice see Günnewig, *The Duty to Pay Reparations for the Violation of the Prohibition of the Use of Force in International Relations and the Jus Post Bellum,* in: Kreß / Lawless (eds.), *Necessity and Proportionality in International Peace and Security Law,* 2021, 439, 464 ff. For a general discussion see Paparinskis, *A Case Against Crippling Compensation*. For a similar solution concerning reparation for violations of the ius contra bellum see Günnewig, *The Duty to Pay Reparations,* 470 ff. In more detail in German, Günnewig, *Schadensersatz Wegen der Verletzung des Gewaltverbots,* 397 ff. The author finds some basis for the application of balancing in post-war inter-state reparations, see pages 401 ff. Her recourse on May's transitional justice theory to further justify the application could provide an interesting independent theoretical justification for introducing such a principle into the international law on reparation. As May's theory is based on Aristotle's virtue ethic and hence starts from a fundamentally different theoretical basis, the author (regrettably) will not pursue this line of argument fur-

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Simply balancing the right to reparation with competing claims does not capture the normative conflict in its full intricacy, though. With an infinite amount of time, the state could fulfill its international obligations while delivering full reparation in a piecemeal fashion with the resources it has left at any given moment. The conflict is thus a tripartite one:

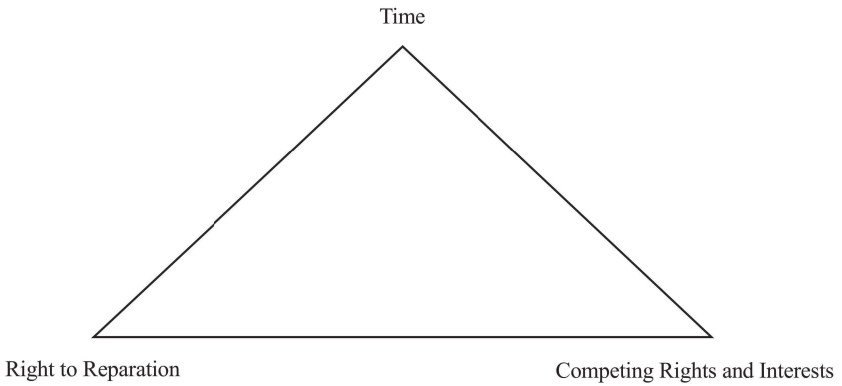

Figure 6: Tripartite Conflict of Reparation in Transitional Justice (created by the author)

In the following, its three elements will be examined in turn, starting with time (a.), continuing with the right to reparation (b.), and finishing with competing rights and interests (c.).

a. Time

Generally, the more time a state has, the more resources its economy generates for reparation. Yet, waiting for reparation further harms survivors. Many types of damage deepen with time, most obviously wounds and chronic diseases. Delayed reparation can also perpetuate survivors' social and economic marginalization.[1253] In the context of individual claims, the rights to an effective remedy and a fair trial oblige states to deliver reparation

ther. While that approach would not explode the limits of the law, it would explode the limits of this book.

1253 Judge Tomka drew further attention to the fact that delayed reparation also causes monetary awards to lose value, ICJ, *Armed Activities Reparations – Declaration of Judge Tomka,* para 10. While the amount of reparation ordered can take account of that fact, the risk is real that it will not. Especially if a reparation program increased

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within a reasonable time.[1254] State and international practice show that this requirement also applies to transitional justice.[1255] What is reasonable depends on the legal and factual complexity of the case, its circumstances, authorities' conduct, and the proceedings' importance for survivors.[1256] A systemic backlog in the judicial or administrative system cannot justify delays, as states are responsible for setting up a system that can cope with the pending caseload.[1257] The ECtHR makes a reasonable exception when the backlog is due to a sudden increase in applications, to which the state already reacted with prompt and adequate measures. Among those exceptional situations are political unrest, heightened tension in society, and significant political changes, such as decolonization or the transition to democracy.[1258]

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reparation amounts over time to balance out inflation, it would probably risk the perception that it treated survivors unequally.

1254 HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 44(a); HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 19; HRCom, *Sundara Arachchige Lalith Rajapakse v. Sri Lanka*, CCPR/C/87/D/1250/2004, 1250/2004, 2006, para 9.5; CAT, *GC 3*, CAT/C/GC/3, para 39; ECtHR, *De Souza Ribeiro v. France*, 22689/07 (Grand Chamber), 2012, para 81; AComHPR, *GC 4*, para 26, 70; IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 2020, para 325; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, para 2(i).

1255 Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice – A Historical Perspective*, 2009 Hum. Rts. Q. 31(1), 163, 208 f.; AU, *Transitional Justice Policy*, 2019, para 66(iv); Guembe, *The Argentinean Experience*, 32 f.; Houtte et al., *The UNCC*, 342; ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste*, 8 f.; ECOSOC, *Impunity Principles*, E/CN.4/2005/102/Add.1, principle 32; ECOSOC, *Pinheiro Principles*, E/CN.4/Sub.2/2005/17 Annex, principle 12.1, 12.3; UNGA, *Basic Principles*, A/RES/60/147, para 11(b); General Congress of the United Mexican States, General Victims Act, art. 7(III), 30. On the applicability of the right to a fair trial to the situation at hand see below, F.

1256 ECtHR, *Frydlender v. France*, 30979/96 (Grand Chamber), 2000, para 43; ECtHR, *Nicolae Virgiliu Tănase v. Romania,* 41720/13 (Grand Chamber), 2019, para 209; IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*, para 171; IACtHR, *Radilla-Pacheco v. Mexico*, para 244; IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 2020, para 322 ff.; HRCom, *Mariano Pimentel et al. v. The Philippines*, CCPR/C/89/D/1320/2004, 1320/2004, 2007, para 9.2; CERD, *Kamal Quereshi v. Denmark*, CERD/C/66/D/33/2003, 33/2003, 2004, para 6.4; HRCom, *Taito Fa'afete v. New Zealand*, CCPR/C/114/D/1909/2009, 1909/2009, 2015, para 7.3, although the complaint related to criminal proceedings.

1257 ECtHR, *Vocaturo v. Italy*, 11891/85 (Chamber), 1991, para 17.

1258 ECtHR, *Foti and Others v. Italy*, 7604/76 (Chamber), 1982, para 61; ECtHR, *Unión Alimentaria Sanders S.A. v. Spain*, 11681/85 (Chamber), 1989, paras 38 ff.; ECtHR, *Guincho v. Portugal*, 8990/80 (Chamber), 1984, paras 36 ff. Similarly, IACtHR, *Case*

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Transferring this jurisprudence to the situation of large-scale administrative reparation programs gives an idea of the time a state can take to deliver reparation. As the case studies showed, the large universe of survivors typically causes a backlog in cases. These cases are often of considerable complexity, including difficulties establishing evidence and a challenging environment for investigations. Uncertain political conditions and heightened tensions can further delay the process. These factors will justify potentially significant delays in comparison to domestic reparation proceedings under normal circumstances. On the other side of the scale, reparation programs usually deal with cases of grave human rights violations, which often leave survivors in a highly vulnerable position. The resulting importance reparation has for survivors makes it incumbent upon the state to speed up the process with all available means – standardized forms and procedures, video-orientation of survivors before entering the program, and assigning the reparation program to specialized agencies and staff are just a few. In sum, the transitional justice situation allows for significant delays in the provision of reparation, as long as the state makes a genuine effort to keep those delays at the minimum level possible.

While the specific amount of time any given proceeding can take cannot be determined in the abstract, the standard discerned here is sufficiently concrete to amend the obligation to provide reparation to an obligation to provide *prompt* reparation. This allows reducing the tripartite conflict to a two-sided one between the aggregated claims to prompt and full reparation and competing rights and interests:

Figure 7: Two-Sided Conflict of Reparation in Transitional Justice (created by the author)

The two-sided conflict can be approached with the methodology to resolve normative conflicts detailed above. For that, it is necessary to define the factors influencing the weight the right to reparation accrues in the balancing exercise.

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of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, 2020, para 323 ff.; IACtHR, *Garibaldi v. Brasil*, 2009, para 137; IACtHR, *Forneron and Daughter v. Argentina*, 2012, para 74.

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b. The Right to Reparation

As a secondary right, the right to reparation does not possess a high abstract weight. It is neither absolute nor does it protect values of supreme importance.[1259] Its concrete importance depends on the degree of interference in any given situation. The further removed the reparation award is from full reparation, the stronger the interference and the heavier the right to reparation's concrete importance. While the concrete importance can only be determined in light of concrete situations, it is generally influenced by the flexibility with which the right to reparation accommodates other rights and interests in its scope of protection. If interpretation already reduces the concept of full reparation on this definitional level, less interference is necessary, and the right to reparation's concrete importance will decline accordingly.

The concept of full reparation provides some openings to consider the context in which it is administered. Reparation must be adequate and proportionate to the gravity of the violation, and the harm suffered.[1260] Under normal circumstances, full reparation fulfills these criteria. If that were true under all circumstances, overarching requirements of adequacy or proportionality would be redundant. Reparation simply had to be equivalent – not proportionate – to the harm suffered. Thus, adequacy and proportionality lessen the strict standards of full reparation in certain contexts.[1261] Given the competing interests in transitional situations, full reparation would place a disproportionate burden on the state. It would be detrimental to the protection of other human rights. Systematic and teleological considerations hence support loosening the strict demands of full reparation in transitional justice to ensure reparation's adequacy and proportionality. Similar considerations pertain to several forms of reparation. Restitution must not constitute a burden out

1259 See above, B.II.2.a.

1260 See generally ch. 1, D., as well as UNGA, *Basic Principles*, A/RES/60/147, e.g. para 2(c), 11(b), 15; IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 1; Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice – A Historical Perspective*, 2009 Hum. Rts. Q. 31(1), 163, 208 f.; AU, *Transitional Justice Policy*, 2019, para 66(iv); ECOWAS Court of Justice, *Djot Bayi & 14 Others v. Nigeria and 4 Others*, ECW/CCJ/JUD/01/09, para 45, using the words "just" and "equitable"; Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, 452.

1261 Gray, *Remedies*, 891; IACtHR, *Aloeboetoe v. Suriname*, para 49, saying that "in certain cases" the standard may not be appropriate.

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of all proportion in comparison with the lower benefit of compensation.[1262] Compensation for non-pecuniary damage is based on equity, considering all the circumstances of the case.[1263] Even compensation for pecuniary damage, costs, and expenses is based on equity if the damage's exact scope is difficult to assess.[1264] The last-mentioned problem is ubiquitous in transitional justice; not only because evidence might be scarce but also because, in uncertain times, some positions such as future earnings evade reliable calculation. Again, it would be inequitable if the demand for compensation would unduly strain the resources available for the rest of society.

All these entry points allow considering the transitional situation's difficult circumstances when assessing the scope of full reparation. However, reducing full reparation on this level has its limits. The transitional situation's constraints typically are so great that the resulting reparation bears little resemblance to full reparation. Interpretation alone cannot justify such an outcome. It cannot negate the right to reparation.[1265] The restrictions transitional justice places on reparation must still be construed as a limitation of the right to reparation. As such, they must be necessary and proportionate, striking a fair balance between the competing positions. The openings the right to reparation's scope of protection offers diminish its concrete importance in that balancing exercise. They do not make balancing unnecessary.

c. Competing Rights and Interests

After having established that the right to reparation can integrate competing claims to a degree in its scope of protection, the other side of the equation warrants attention. Naturally, this section cannot examine all claims potentially competing with reparation. This can only be done in concrete situations. Instead, the following sections will give rough guidance to assessing the weight of groups of claims in the balancing exercise. These groups are positive human rights obligations (aa.), negative human rights obligations (bb.), and state interest (cc.).

1262 ILC, *ASR*, A/56/10, art. 35(b).

1263 See above, ch. 1, C.II.

1264 ECtHR, *Guiso-Gallisay v. Italy*, 58858/00 (Grand Chamber), 2009, para 107; IACtHR, *Myrna Mack Chang v. Guatemala*, para 291; ECtHR, *Andrejeva v. Latvia*, 55707/00 (Grand Chamber), 2009, para 116.

1265 Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 1998 Yale Hum. Rts. Dev. L. J. 1(1), 85, 102 f.; Pauwelyn, *Conflict of Norms in Public International Law*, 254.

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aa. Positive Human Rights Obligations

States often pitch the need for development against extensive reparation programs.[1266] This argument has a legitimate core since the general population has rights to adequate healthcare, life, work, social security, bodily integrity, an adequate standard of living, education, and others. The resources needed for full reparation can seriously stifle progress in all these areas. Positive human rights obligations encapsulate this dimension of the conflict best. These require the state to take positive action to enable persons under its jurisdiction to enjoy their human rights.[1267] They arise both under economic, social, and cultural rights as well as civil and political rights. For both, their abstract weight depends on the rights they are attached to. The weightier the values these rights protect, the higher is the abstract weight of the obligation. Their concrete importance depends on how far the situation at hand falls behind what is legally required.[1268] On the one hand, this depends on the factual situation. The less the enjoyment of human rights is factually possible, the more critical it gets that the state fulfills its positive obligations.[1269] On the other hand, concrete importance depends on the scope of positive obligations. This, in turn, depends on the degree to which the challenges of the transitional situation can influence the scope of protection positive obligations offer. While both civil and political rights and economic, social, and cultural rights are closely connected dogmatically, the methodology for determining this latter point must account for differences in their structure.[1270]

States must employ the maximum amount of available resources to realize economic, social, and cultural rights progressively. [1271] Progressive realization must transpire "as expeditiously and effectively as possible."[1272] When assessing the amount of resources states must invest into progressive realization,

1266 Colvin, *Overview of the Reparations Program in South Africa*, in: de Greiff (ed.), *Handbook of Reparations,* 2006, 176, 186.

1267 Shelton/Gould, *Positive and Negative Obligations*, in: Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, 562, 562 f.

1268 Above, this has been termed "degree of non-satisfaction", B.II.2.b.

1269 This follows from the discussion of core obligations, above, B.II.2.c and concretely below, E.II.4.c.bb.

1270 cf. Vandenhole, *Conflicting Economic and Social Rights - The Proportionality Plus Test*, in: Brems (ed.), *Conflicts Between Fundamental Rights,* 2008, 559, 588 f.; Eide, *Adequate Standard of Living*, in: Moeckli et al. (eds.), *International Human Rights Law,* 2nd Edition 2014, 195, 212.

1271 Art. 2 (1) ICESCR.

1272 CESCR, *GC 3*, E/1991/23, para 9.

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all circumstances need to be considered, including competing demands of international human rights standards.[1273] States enjoy broad discretion in that area. Their choices must be reasonable and reflect the importance and priority of economic, social, and cultural rights.[1274] This high degree of flexibility and the possibility to account for competing demands greatly diminishes the concrete importance of positive obligations under economic, social, and cultural rights. Again though, they cannot be interpreted away.[1275] Fully meeting the demands of the right to reparation cannot require halting progress in realizing economic, social, and cultural rights entirely. A genuine conflict thus still exists and must be resolved by striking a fair balance between progressive realization and reparation.[1276]

Reparation can also affect a state's obligation to fulfill civil and political rights. This obligation entails that the state creates an environment in which individuals can enjoy their rights.[1277] Reparation can infringe this dimension of civil and political rights in two ways. First, the state is obliged to work on infrastructure and other projects to enhance the enjoyment of human rights.[1278] Large-scale reparation programs can divert resources from such projects and slow them down. Second, a state must prevent conflict or other systematic human rights violations as this would strongly impede

1273 CESCR, *Evaluation of the Obligation to Take Steps to the "Maximum Available Resources"*, E/C.12/2007/1, para 8; CESCR, *GC 3*, E/1991/23, para 11; Riedel, *International Covenant on Economic, Social and Cultural Rights (1966)*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Online Edition 2011, para 8.

1274 Alston/Quinn, *The Nature and Scope of States Parties' Obligations Under the ICESCR*, 180 f.; CESCR, *The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights,* E/C.12/2000/13, 2000, para 28.

1275 Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 102 f.; Pauwelyn, *Conflict of Norms in Public International Law*, 254.

1276 On the necessity to balance the rights of the covenant with state interests, CESCR, *Concluding Observations - Israel,* E/C.12/1/Add.90, 2003, para 31; Generally on positive human rights obligations, ECtHR, *Hatton and Others v. The United Kingdom*, 36022/97, para 98, stating that "the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole".

1277 Mégret, *Nature of Obligations*, 103; de Schutter, *International Human Rights Law*, 461; Lavrysen, *Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights*, 2014 Inter-Am. Eur. Hum. Rts. J. 7, 94, 110; Schabas, *ECHR Commentary*, 90 f.; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 7; ECOSOC, *Updated Study on the Right to Food, Submitted by Mr. Asbjorn Eide,* E/CN.4/Sub.2/1999/12, 1999, para 15.

1278 HRCom, *GC 36*, CCPR/C/GC/36, para 26.

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the enjoyment of human rights generally.[1279] Reparation can, under certain circumstances, exacerbate tension in the population and thereby enhance the risk that systematic human rights violations resume.[1280]

The abstract and concrete weight of the last-mentioned obligation is exceptionally high, given the grave and multiple dangers conflict poses to the enjoyment of fundamental human rights. This does not translate into a great weight of that obligation in the balancing exercise, though. No straight chain of causation runs from awarding reparation to heightened instability or the resumption of human rights violations. It is never certain whether reparation will exacerbate tension and make the recurrence of systematic human rights violations more likely. Hence, the low or unclear probability with which reparation could lead to these consequences diminishes the weight of that argument accordingly. Besides, the state can mitigate tensions and make resumed conflict less likely.[1281] The obligation's weight should therefore not be overestimated.

The concrete importance of the obligation to enhance the enjoyment of human rights depends on how flexibly its scope of protection accommodates competing claims. The positive obligation to take steps to ensure the full enjoyment of human rights is a due diligence standard. It does not require the state to prevent any infringement of the right concerned but to take reasonable preventive measures.[1282] As the ECtHR detailed:

1279 HRCom, *GC 36*, CCPR/C/GC/36, para 69 f.; HRCom, *General Comment No. 6 - Article 6 (Right to Life),* HRI/GEN/1/Rev.1, 1982, para 2. Relatedly, the ECtHR considered that the "restoration of peace" is a legitimate aim under the convention, ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina,* 27996/06 (Grand Chamber), 2009, para 45. Of course, one could also categorize this as an issue of the dimension to protect individuals from interference with their rights by third parties or the respect dimension, if there is a danger of renewed systematic human rights violations by state agents. However, on a highly abstract level, the dimension to fulfill captures the holistic work needed to prevent such events from happening. The obligation to respect and protect concern more individualized conduct and thus let broader structural factors of renewed conflict fade from view.

1280 Usually, this will not happen through such a direct causal chain of events that one could classify reparation as the state action that failed to respect human rights. Therefore, on an abstract level, reparation is better conceived as a factor, which caused a worsened human rights situation generally.

1281 Fears of tension were successfully addressed in Timor-Leste by employing mediation teams and because survivors spread the benefits in the community, ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste*, 8 ff.

1282 Shelton/Gould, *Positive and Negative Obligations*, 577.

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> *"In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden."*[1283]

This context-dependency can account to a degree for the competing demands of the right to reparation and, therefore, somewhat diminishes the concrete importance of positive obligations under civil and political rights. Again, though, competing reparation claims cannot entirely do away with positive obligations under civil and political rights.

bb. Negative Human Rights Obligations

Reparation can also compete with states' negative obligation to respect human rights. In the realm of civil and political rights, reparation can touch upon the obligation to respect by directly interfering with other persons' human rights. Such scenarios are manifold. Consider as an apparent example prosecution as a form of reparation. Their resolution depends on the circumstances. It is impossible to give general guidelines to that effect beyond what was said at the beginning of this chapter. Economic, social, and cultural rights entail two negative obligations. They forbid retrogression in their realization and contain a minimum core of realization, which must not be frustrated.[1284] The abstract weight of those obligations again depends on the abstract weight of the rights in question. Their different structure influences their concrete importance.

Retrogression triggers the presumption that the right concerned is violated. Retrogressive measures can be justified by reference to other rights within the covenant if the state considers all other alternatives against the context of its maximum available resources.[1285] The Committee on Economic, Social

1283 ECtHR, *Ilascu and Others v. Moldova and Russia*, 48787/99 (Grand Chamber), 2004, para 332. Similarly HRCom, *GC 36*, CCPR/C/GC/36, para 21.

1284 CESCR, *GC 3*, E/1991/23, para 9 f.; Saul et al., *The International Covenant on Economic, Social and Cultural Rights - Commentary, Cases and Materials*, 2014, 145 ff.

1285 Such is the standard phrasing by the CESCR. For an enumeration of general comments containing that standard see OHCHR, *Protection of Economic, Social and Cultural Rights in Conflict*, 2015, para 25.

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and Cultural Rights (CESCR) noted that it would consider "serious claims on [a state's] limited resources, for example, resulting from […] recent internal or international armed conflict."[1286] Retrogressive measures can hence be justified with reference to reparation, if necessary and proportionate.[1287] The prohibition's concrete importance in the balancing exercise depends on the severity of retrogression.

The treatment of minimum core obligations under economic, social, and cultural rights is dogmatically less clear. For some rights, the CESCR held that states must fulfill these minimum core obligations immediately and prioritize all available resources for their satisfaction. Whether a state discharged these obligations must be assessed against resource constraints the state faces.[1288] For other rights, the CESCR fleshed out core obligations, for which "a State Party cannot, under any circumstances whatsoever, justify

1286 CESCR, *Evaluation of the Obligation to Take Steps to the "Maximum Available Resources"*, E/C.12/2007/1, para 10.

1287 cf. CESCR, *Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights*, 2012; CESCR, *Concluding Observations on the Fourth Periodic Report of Argentina,* E/C.12/ARG/CO/4, 2018, para 6(e); CESCR, *Concluding Observations on the Fourth Periodic Report of France,* E/C.12/FRA/CO/4, 2016. For further sources of the committee employing that standard see Warwick, *Socio-Economic Rights During Economic Crises - A Changed Approach to Non-Retrogression*, 2016 Intl. Comp. L. Q. 65(1), 249, fn. 58. The author also traces the genesis of the comparatively new standard and offers some critique, 252 ff. The other requirements apart from necessity and porportionality – namely the temporary nature of the measure, non-discrimination and protection of core obligations – are either of no concern for this study or are treated at other points in this chapter. If states limit an economic, social or cultural rights for other reasons than a lack of resources, Art. 4 ICESCR allows them to do so, Saul et al., *The ICESCR*, 257 f. In that case, the restriction must also pursue a legitimate aim, be necessary and proportionate, CESCR, *General Comment No. 21 - Right of Everyone to Take Part in Cultural Life* E/C.12/GC/21, 2009, para 19; Saul et al., *The ICESCR*, 254 ff. The resolution of such conflicts cannot be determined in the abstract, it depends on the factors outlined above, B.II.2, esp. b. Art. 4 ICESCR played a minor role in practice so far since most cases, in which states have to limit economic, social and cultural rights hinge upon the availability of resources, Saul et al., *The ICESCR*, 246 f.

1288 CESCR, *GC 3*, E/1991/23, para 10; CESCR, *Evaluation of the Obligation to Take Steps to the "Maximum Available Resources"*, E/C.12/2007/1, para 6; CESCR, *General Comment No. 19 - The Right to Social Security,* E/C.12/GC/19, 2007, para 60; CESCR, *Limburg Principles*, E/C.12/2000/13, para 72.

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its non-compliance."[1289] It is unclear how these two lines of argument relate to each other. Some authors treat the differing standards simply as inconsistencies, heavily criticizing the expanding scope of non-justifiable core obligations.[1290] Mechlem convincingly showed that some nations would be unable to comply with the extensive core obligation catalogs the CESCR drew up especially in its general comments on the right to water and health, should non-compliance truly be unjustifiable. It would also be at odds with the general framework of the International Covenant on Economic, Social and Cultural Rights (ICESCR), its object and purpose, as well as subsequent state practice.[1291] As shown above, it is also theoretically more convincing to perceive core obligations as the result of a proportionality assessment rather than as abstractly defined obligations.[1292] Hence, the core obligations' scope should be identified against the capabilities a state has when directing all available resources to meet them. Falling behind minimum core obligations thus defined is a particularly strong retrogression, which carries such strong concrete importance that it will outweigh almost all competing claims to reparation.[1293]

cc. State Interests

Lastly, large-scale reparation programs can touch any legitimate state interests by diverting resources from them. Among these legitimate interests are upholding the state's internal order and pursuing economic development.[1294] The abstract weight of these interests depends on their importance in the

1289 CESCR, *GC 14*, E/C.12/2000/4, para 47; CESCR, *General Comment No. 15 - The Right to Water,* E/C.12/2002/11, 2003, para 40; CESCR, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* E/C.12/2000/13, 2000, para 9 f.

1290 Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 2009 Vand. J. Transnatl. L 42(3), 905, 940 ff.

1291 Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 943 f.

1292 See above, B.II.2.c.

1293 Should one choose to follow the interpretation of abstract core obligations non-compliance with which cannot be justified, the result would only be a little stronger. The gap between "outweigh almost all competing claims" and "impossible to justify" seems more theoretical than of practical relevance.

1294 Public order is recognized as a legitimate aim for restricting rights in the derogation clauses, namely Art. 4(1) ICCPR, Art. 15 ECHR, Art. 27(1) ACHR. Development needs of the state are recognized in Art. 32(2) ACHR, referring to general welfare for development; Art. 23, 24, 27(2) ACHPR, referring to common interests for development. It was also recognized in IACtHR, *Salvador Chiriboga v. Ecuador*, 2008, para 73.

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human rights framework.[1295] The fact that human rights protect the individual against state interests diminishes their abstract weight. There is hence a presumption that human rights take precedence.[1296] Not least because of that, the ECtHR demands that competing positions other than those backed by convention rights must be indisputable imperatives to place a legitimate restriction on individual rights.[1297] This demand is even more robust in the case under consideration because the state assumed the obligation to repair by violating survivors' rights. The state could have avoided the burden of reparation so that easing it for safeguarding state interests requires greater justification than when reparation affects third parties. The concrete importance of state interests depends on the degree to which reparation interferes with them. Again, when it comes to the claim that reparation could put internal order in jeopardy, one must factor in the probability of this event and the possibility to take mitigating measures.[1298]

5. Summary

The resources to be allocated to the reparation program are an outcome of obligations to increase the resources available and distribute them fairly between the competing rights and obligations. The first set of obligations consists of a loose responsibility to raise resources; the duty to seek external support and synergies between reparation and assistance, without diluting reparation's roots in state responsibility. While this makes the normative conflict between prompt reparation and competing obligations less pressing, it is too severe to avoid it entirely. States must balance the aggregate claims to prompt reparation with the positive and negative human rights obligations and state interests with which they conflict. The outcome depends on the abstract weight and concrete importance of the relevant positions and the probability with which they are affected. Naturally, that depends to a large degree on the concrete situation. As far as possible in the abstract, the previous section considered factors that influence the respective positions' weight. It found that the right to reparation does not possess an exceptionally high

1295 See above, B.II.2.b.
1296 Cariolou, *The Search for an Equilibrium by the ECtHR*, 251, 265 f.
1297 ECtHR, *Chassagnou and Others v. France*, 25088/94 (Grand Chamber), 1999, para 113.
1298 For details regarding the concrete weight and the operation of the probability factor in a similar context see above, E.II.4.c.aa.

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abstract weight. Its scope of protection can accommodate challenges of the transitional situation, diminishing its concrete importance. The following matrix summarizes decisive factors influencing the weight of other positions in the balancing exercise, using the values of the triadic scale, light, medium, or strong (l, m, s):[1299]

Competing Claim	Abstract Weight	Concrete Importance	Factors Determining Concrete Weight
Positive Human Rights Obligations			
Progressive Realization of Economic, Social, and Cultural Rights	l-s	l-s	– Abstract weight of right(s) realized – Level of realization – Degree of non-satisfaction envisaged – Number of persons affected[1300] – Probability of non-satisfaction
Obligation to Fulfill Civil and Political Rights	l-s	l-s	– Abstract weight of right(s) fulfilled – Degree of fulfillment – Degree of non-satisfaction envisaged – Number of persons affected – Probability of non-satisfaction
Obligation to Prevent Conflict under Civil and Political Rights	s	l-m	– Probability that reparation enhances the risk of resumed conflict

1299 On the triadic scale see above, B.II.2.b.

1300 While the number of persons affected influences the concrete weight of the different rights and interests at play, balancing cannot be reduced to counting the quantity of people affected on each side of the equation. A core function of human rights is to protect minorities, so that giving decisive weight to numbers would undermine one of their fundamental purposes, Çalı, *Balancing Human Rights? Methodological Problems With Weights, Scales and Proportions*, 2007 Hum. Rts. Q. 29(1), 25, 261 ff.; ECtHR, *Hatton and Others v. The United Kingdom - Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner*, 36022/97 (Grand Chamber), 2003, para 14. Hence, it is crucial not to treat balancing as a numbers game. Determining whether an interference with a right is light, medium or strong is at its core a value judgment in light of the object and purpose of the rights in question and the circumstances of the case at hand, Klatt/Meister, *The Constitutional Structure of Proportionality*, 2012, 12, 57.

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Competing Claim	Abstract Weight	Concrete Importance	Factors Determining Concrete Weight
Negative Human Rights Obligations			
Prohibition of Retrogression in Realizing Economic, Social, and Cultural Rights	l-s	m-s	– Abstract weight of right(s) whose realization retrogresses – Degree of retrogression – Number of persons affected – Probability of retrogression
Core Obligations under Economic, Social, and Cultural Rights	l-s	s	– Abstract weight of right(s) whose core obligations are concerned – Number of persons – affected – Probability of infringement
Obligation to Respect Civil and Political Rights	l-s	l-s	– Abstract weight of right(s) concerned – Severity of interference – Number of persons affected – Probability of interference
State Interests			
State Interests	l-m	l-s	– Abstract weight of interest(s) – Degree of interference – Probability of interference

Figure 8: Balancing Matrix (created by the author)

Obviously, a matrix covering such diverse and complex situations remains at a high level of abstraction, leaving states a lot of discretion.[1301] Its abstract nature makes the approach prone to abuse. It provides states with the language to justify cuts in reparation demands while not allowing for close scrutiny of those justifications. This makes a caveat all the more important: Any restrictions on the scope of reparation programs must be necessary. States must demonstrate the existence of a normative conflict and the extent to which it justifies diminishing the scope of a reparation program.[1302] They must also attempt everything in their power to avoid normative conflict. They must use their resources as efficiently as possible when providing reparation and design reparation as far as possible in a way that furthers fulfillment of their other obligations instead of conflicting with them.[1303]

1301 See on that also ECtHR, *Pentiacova and Others v. Moldova, Decision on Admissibility,* 14462/02, 2005, 13.
1302 Ducoulombier, *Conflicts Between Fundamental Rights*, 223 f.
1303 On the legal constraints of that strategy see above, E.II.3.

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6. Challenges

Challenging the present approach, one could doubt whether the right to reparation is open to balancing at all. After all, the state voluntarily assumed the burden of reparation by choosing to violate human rights. It could act in bad faith if it violated a human right and then claim competing interests to diminish the consequential obligation to award reparation.[1304] This position would make the right to reparation de facto an absolute right, which was shown above to be implausible.[1305] Furthermore, limiting the right to reparation is necessary to safeguard not only state interests but also the rights of others. Denying that possibility would affect not only the responsible state but also third parties. Although somewhat anachronistic, balancing hence better serves the overall goal of protecting all human rights of everyone.

A second challenge could be that balancing merely substitutes one problem with the next. Instead of overwhelming states' resources, the reparation programs' financial scope can be limited so severely that the measures they provide to each survivor become diluted to the degree that reparation becomes meaningless. This challenge will be taken up in the next section, especially when considering the unique role of satisfaction in transitional justice reparation efforts.[1306] But before turning to the output of reparation programs, there is the elephant in the room to address. The reader's main doubt at this point will, in all likelihood, not lie so much with the technical question of whether balancing is permissible in the situation at hand or with a fear of dilution of benefits. Rather, the reader might doubt the author's relationship with reality.

1304 AComHPR, *GC 4*, para 34. The commission holds that states cannot rely on limited resources to evade awarding comprehensive reparation. It leaves room to lower the amount awarded, since comprehensive reparation is a flexible concept. The ECtHR frequently holds that states cannot "cite lack of funds as an excuse for not honouring a judgment debt", ECtHR, *Burdov v. Russia*, 59498/00 (First Section), 2002, para 35; ECtHR, *Sharxhi and Others v. Albania,* 10613/16 (First Section), 2018, para 154. However, it draws this conclusion from Art. 6(1), 13 ECHR, guaranteeing the enforcement of judgments. The line of jurisprudence therefore cannot substantiate the position that the right to reparation cannot be limited. Only under the special circumstance that a judgment ordered the state to pay reparation can it support such a position. Furthermore, it is not a lack of funds as such that provides a justification for limiting the right to reparation, but the existence of legitimate other claims against the state's resources.

1305 See above, B.II.2.a.

1306 See below, E.IV.2.b.

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No reality fits in a neat matrix; the particularly complex reality of transitional justice situations even less. Striking a balance by identifying the abstract weight, concrete importance, and probability of interference with all rights and interests reparation programs touch hardly seems to deliver on the author's promise to restore the international law on reparation's guiding function in transitional justice. This doubt cannot be repudiated by further concretizing the matrix or readily admitting that concretizing is feasible only for concrete situations. Instead, expectations towards what the normative conflict approach, and indeed any legal approach, can achieve must be lowered. Law will never provide a formula, which only requires the correct data to deliver the exact amount of resources needed for adequate reparation in transitional justice. For that, the situation is too complex and contingent. Reparation in transitional justice will always result from a political process and be subject to continuing negotiations between the state, survivors, and other actors. In the often dynamic transitional justice situations, reparation programs are constantly renegotiated, reevaluated, and adapted to new developments and information. Law cannot replace that. But the political processes just described often suffer from an equivocation: When debating, which reparation is adequate, the state tends to point to its limited resources, defending reparation's adequacy as the maximum it allegedly was able to administer. Survivors, in turn, criticize reparation as inadequate because it does not serve to overcome their harm. Such an equivocation about what makes reparation adequate is fatal. It renders any debate or negotiation fruitless and frustrates all sides. Law can remedy this situation not by prescribing exact outcomes but by providing the actors involved with a common language and a structured process to justify and criticize reparation efforts. It thereby allows rational debate and fruitful negotiation about the adequacy of reparation in transitional justice. While modest, that – not exact calculation – is what the law on reparation can achieve in transitional justice.

III. Distribution: Breaking Down the Scope of the Program

So far, the analysis treated survivors' claims to reparation as a monolithic aggregate. Once balancing determined the absolute amount of available resources that way, they must be distributed internally among survivors. This distribution equals a zero-sum-game between survivors and hence puts their respective claims to reparation in conflict. The abstract weight of those claims is irrelevant because the conflict exists between different holders of the same

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right. With the abstract weight the same, each survivor's share should be reduced by the same factor. That way, all claims to reparation would be limited equally, and the result would still reflect the amount of harm suffered.

Alternatively, one could also focus on need, giving a larger share to more indigent or vulnerable survivors. Less affluent survivors rely stronger on reparation to overcome their harm. According to the principle of diminishing marginal utility, the same amount of material benefit has more utility for a poor survivor than for a rich one, all other circumstances being equal.[1307] Still, the object of reparation is not to raise survivors' standard of living. It remedies harm incurred. In many cases, a survivor's poverty will exacerbate the harm suffered from a human rights violation. Losing the only plot of land one relies on for subsistence farming will have much graver consequences than losing part of an agricultural empire. In that case, reparation must account for that exacerbated effect. Nevertheless, its object is then still to remedy harm, not raising the survivor's standard of living. Relying on need, therefore, misconstrues the telos of reparation. The only factor for the just distribution of the available resources among survivors is the seriousness of the harm. In practice, this could mean downscaling measures if their costs and the general burden of providing them would go to the detriment of other survivors. It can consume a disproportionate amount of resources, e.g., to fly survivors out of the country to receive specialized medical treatment. A second-best alternative striking a fairer balance with other needs for reparation might be to mitigate pain and detrimental effects of an ailment until the general health care system is sufficiently developed to provide specialized treatment. Again, it deserves emphasis that states have an obligation to avoid such a conflict as far as possible. Instead of flying in trained psychologists, training could enable laypersons to deliver limited psychological interventions and remit only the gravest cases to the few trained psychologists available in the country.[1308] As in general, the law demands a state's creativity and ingenuity before it can legitimately claim a normative conflict. That will be the subject of the following section.

1307 Sampat Mukherjee et al., *Microeconomics*, 2004, 49 f.

1308 As an example of the feasibility of this approach see the Lubanga-case before the ICC above, ch. 2, D.III.2.b.aa.; Chibanda, *Why I Train Grandmothers to Treat Depression,* TEDWomen2017, 2017.

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IV. Output: Devising Adequate Reparation Measures

Obligations to raise resources, use them efficiently, and strike a fair balance between competing demands define reparation programs' input. Internal balancing breaks this number down to how much each survivor is entitled to. That says little about the programs' output. Which concrete reparation measures should the state devise? This section will fill that gap. The starting point is that the international law on reparation demands full reparation for each survivor. After a quick recap of what that entails (1.) the chapter will adapt these demands to the unique transitional situation by according a critical role to satisfaction (2.).

1. Applying Full Reparation in Transitional Justice

As demonstrated, there is no need to change the fundamental rules on reparation in transitional justice.[1309] Survivors must receive restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition corresponding to the harm they suffered because of the violation. These measures must serve as far as possible to put them in the position they would be in had the violation not been committed.[1310] It is of little use to specify further in the abstract which reparation measures are adequate for which situation. Devising adequate reparation measures strongly depends on the context. International and national practice abound with examples of adequate measures for different circumstances. Great studies summarize and analyze this question, to which the present one has nothing to add but two general points required by the principle of effectiveness. First, reparation must seek individual effectiveness. To achieve the goal of corrective justice as effectively as possible, reparation must ensure that the individual survivor can overcome their harm as effectively as possible.[1311] The same obligation arises out of the obligation to avoid normative conflict. The more effectively a state uses limited resources to overcome individual harm, the less pressing the normative conflict with competing claims is. The state must thus do more

1309 See above, E.I. The Special Rapporteur on Transitional Justice also demands that the content of reparation programs "must be framed within the principle of 'full reparation'", HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 39.

1310 See above, ch. 1, B., C.

1311 The AU explicitly invokes this principle, AU, *Transitional Justice Policy,* 2019, para 66(iv).

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with less. All case studies put this principle into action. For example, most reparation programs coupled individual compensation with seminars on how to best use the money provided, thereby – in theory – enhancing its effect.[1312]

Second, states must look towards general effectiveness, that is, use reparation as effectively as possible to protect human rights through enhancing respect for human rights and establishing general horizontal and vertical trust. The state must tailor the message of validity, applicability, enforceability, and importance of human rights to make state institutions and members of society as trustworthy as possible.[1313] As mentioned above, the obligation to avoid normative conflict also obliges the state, if possible, to design reparation in a way that furthers general interest, decreases tension, and benefits the broader population. Beyond these general considerations, the state still has a significant degree of flexibility in designing reparation measures. There is no single correct solution, and the state is free to choose among measures of equal effectiveness.

These vague clarifications leave untouched a question mark carried over from the previous section. Broadly balancing the aggregated claims to reparation with competing claims might enable the state to award reparation to all survivors and make eligibility restrictions unnecessary. But how can it be prevented that the balancing exercise dilutes the benefits given to each survivor beyond recognition?

2. The Residual Function of Satisfaction

While almost all survivors must be eligible for reparation and receive benefits, not every survivor must "necessarily [receive benefits] at the same level or of the same kind."[1314] Not every survivor must receive costly measures like compensation or go through complex and costly procedures required, e.g., by many restitution cases. Yet, the fundamental problem remains that reducing the material scope of reparation programs while advocating for comprehensive, complete, and full reparation seems to make the dilution of individual reparation measures inevitable. One measure exists, though, which can be rolled out adequately at little cost to a large number of survivors: satisfaction.

1312 See above, ch. 2, B.IV.2.b., c., C.IV.3.b., D.III.3.b.bb.

1313 For this obligation in the context of symbolic reparation see below, E.IV.2.b.

1314 OHCHR, *Reparation Programmes*, 15; HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 45.

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a. Defining Satisfaction

As discerned above, international practice rarely defines satisfaction in a way that would allow precise interpretation of its role within a broader framework. Relevant documents, judgments, and other national or international practice usually provide a laundry list of possible measures, including apologies, monuments, commemoration ceremonies, and many others.[1315] Practice gives little indication of what ties these examples together.

As a starting point, chapter one defined satisfaction as a symbolic act to remedy harm that is not financially assessable.[1316] This definition allows two approaches to clarify the role of satisfaction further; one looking at its function, the other at its form.

Functionally, satisfaction addresses harm that is not financially assessable, such as ruptures in a community's social fabric, feelings of humiliation, degradation, etc.[1317] Ideally, it helps survivors lend new meaning to and make sense of their situation,[1318] thereby restoring their dignity, honor, and reputation.[1319] How reparation can achieve these aspiring goals is best explored through its form. All satisfaction measures have in common that any material benefit they might entail is only incidental.[1320] Satisfaction's reparative value lies in its symbolism. At a high level of abstraction, symbols are something that stands in for something else.[1321] Peirce's more detailed

1315 Shelton, *Remedies in International Human Rights Law*, 396, 278; UNGA, *Basic Principles*, A/RES/60/147, para 22(d).

1316 See above, ch. 1, C.III. Shelton, *Remedies in International Human Rights Law*, 383 f.; Odier Contreras-Garduno, *Collective Reparations*, 89.

1317 Non-exhaustive lists of the damages addressed by satisfaction can be found at, Shelton, *Remedies in International Human Rights Law*, 346 f.; Odier Contreras-Garduno, *Collective Reparations*, 89 ff.; McCarthy, *Reparations and Victim Support in the ICC*, 283, 290.

1318 OHCHR, *Reparation Programmes*, 23; Hamber, *Narrowing the Micro and the Macro*, 560, 566.

1319 Wyler/Papaux, *The Different Forms of Reparation - Satisfaction*, 625; ILC, *Second Report on State Responsibility by Special Rapporteur Arangio-Ruiz*, A/CN.4/425, para 13; *Rainbow Warrior Case*, para 122; Ramírez, *La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones*, 80.

1320 Naturally, this distinction is not clear-cut. There will be grey areas, in which a form of reparation will repair both through its material and symbolic value. The individual compensation payment in the Katanga-case at the ICC probably is a case in point. The amount of 250 USD is not so low that it has no material reparatory value whatsoever. Still, the chamber deemed it mostly a symbolic gesture, see above, D.III.b.bb.

1321 Chandler, *Semiotics - The Basics*, 3rd Edition 2017, 2.

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semiotic model conceptualizes the sign[1322] as a three-part relationship, consisting of the signifier, the signified, and the interpretant. The signifier is the carrier of a sign's meaning – in the case of a common symbolic reparation measure, e.g., the physical monument. The signified is what the sign stands for – e.g., the validity, applicability, enforceability, and importance of human rights. Through introducing the interpretant, Peirce acknowledges the role of the sign's recipient. The interpretant is the image that any given recipient forms of the sign in their mind. This three-part model gives rise to the process of semiosis: The recipient of a sign perceives its signifier, e.g., the block of stone making up the monument. To understand that the signifier stands in for the signified – e.g., the message of validity, applicability, enforceability, and importance of human rights – the recipient must form an image of that relationship in their mind: the interpretant.[1323] For Peirce, a symbol is a sign for which convention ties the signified to the signifier, e.g., a blindfolded woman holding sword and scale signifying justice. The conventional connection is arbitrary. With that, symbols differ from icons, where the signifier resembles the signified (e.g., iconic illustrations of men and women on toilet doors) and indexes, where the signifier logically connects to the signified (smoke as a sign of fire). Without a natural connection between signifier and signified, interpretation plays a prominent role when decoding a symbol's meaning.[1324] Interpretation relies on the situational context as well as social convention. These limit a sign's potential meanings and can guide the processes of semiosis.[1325] This brief summary of one semiotic approach to symbols cannot do justice to this fascinating theory. But taken together with the functional approach above and the transitional justice theory at the basis of this chapter, it can give an approximate account of what satisfaction is and how it can work in transitional justice.

Peirce teaches that symbols can evoke mental images and thereby communicate with their receivers. For that process to remedy harm, the messages symbols send must have a reparative effect. Thus, if satisfaction shall address moral harm by helping survivors make sense of their situation, restoring their

1322 In semiotics, a symbol often denotes a subform of a sign, although no generally accepted definitions of both terms exist. The understanding of the two terms taken here will be clarified below in this section.

1323 Chandler, *Semiotics*, 29 ff., 35 f.; Manning, *Semiotics and Fieldwork*, 1987, 31 f.; Eco, *A Theory of Semiotics*, 1976, 68.

1324 Chandler, *Semiotics*, 41, 45; Peirce/Hoopes, *Peirce on Signs - Writings on Semiotic*, 1991, 251.

1325 Chandler, *Semiotics*, 178 f., 194.

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dignity, honor, and reputation, it must send the corresponding messages. For example, a monument to survivors can communicate that they should take a central place in society instead of suffering marginalization. A commemoration ceremony can lend meaning to violations by communicating that survivors' experiences help society overcome conflict and prevent its recurrence. Simultaneously, symbolic reparation can be particularly well-placed to achieve the transitional-justice-specific aim of reparation. An apology, memorial, or commemoration ceremony has at its core the message that human rights are valid, applicable, enforceable, and important to the state and members of society.

There is no prescribed way of sending these messages. The signifier must connect to its signified in a way that the receivers – survivors and society as a whole – form the corresponding interpretant in their minds. Put less academically: They must receive the intended message. How exactly that can be achieved is a matter of context and cannot be determined in the abstract.

b. Satisfaction's Role in Transitional Justice

No matter what form symbolic reparation takes in the concrete case, it can provide a way out of the dilemma that sticking to full reparation and denying the possibility to exclude survivors from reparation programs caused. Since satisfaction repairs not through material benefits but its symbolic content, it can be administered to many survivors simultaneously. Public apologies, monuments, ceremonies, or other events can reach many survivors in meaningful ways without overburdening the state.[1326] To further ease the financial burden of providing satisfaction, it is essential to recall that both truth and prosecution are forms of symbolic reparation if they deal with the violation suffered by the individual concerned.[1327] Therefore, truth

1326 Antkowiak hints at a similar solution, Antkowiak, *Remedial Approaches,* 399 f.

1327 See above ch. 1, C.III. Hamber, *The Dilemmas of Reparations*, 137 ff. In IACtHR, *Case of the Afro-Descendant Communities Displaced From the Cacarica River Basin (Operation Genesis) v. Colombia*, 2013, the court held that in transitional justice "reparation must be understood in conjunction with other measures of truth and justice (...)", para 470. See further, Lawry-White, *The Reparative Effect of Truth Seeking in Transitional Justice*, 2015 Intl. Comp. L. Q. 64(1), 141, 150 ff. The Special Rapporteur on Transitional Justice excludes other transitional justice mechanisms from the definition of reparation for the reason that they are usually created by other political bodies. It seems to be a practical delimitation rather than one with legal

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commissions, prosecutions, and other mechanisms can be considered satisfaction if they relate to the individual survivors' harm.[1328]

An enhanced role of satisfaction runs into a conceptual problem, though. To provide a way out of the dilemma posited above, it must be the sole reparation measure many, if not most, survivors receive. It cannot, however, simply substitute other material forms of reparation. Whereas, e.g., compensation and rehabilitation can address roughly the same harm and are therefore often interchangeable, satisfaction only addresses financially non-assessable harm. Survivors in transitional justice rarely suffered such harm only. Using satisfaction to make truly comprehensive, complete, and full reparation feasible thus requires expanding its role. The principles of effectiveness and adequacy can justify this expansion.

Broad balancing will reduce the amount of material reparation available – be it in the form of compensation, rehabilitation, or other. Since individual reparation awards should be limited by the same factor to break down reparation programs' financial scope, balancing will reduce the claim to material reparation of survivors who have suffered comparatively less harm to close to zero. In those cases, material reparation cannot fulfill its purpose to overcome the harm the individual suffered. Still providing it would be a mere formalism. Even worse, while the minimum amount due would be worthless to individual survivors, in aggregate, it presented a significant sum, which could develop more impact elsewhere. Such an interpretation would hence unnecessarily impair other rights and interests. Its reduced and adverse effects would also undermine the program's legitimacy. Society and survivors would likely not see minimal material reparation as a genuine reparation effort by the state. Under such circumstances, reparation could hardly communicate the validity, applicability, enforceability, and importance of human rights. On the contrary, it might be perceived as mockery. Thus, rigidly sticking to the law's letter would undermine both the individual and transitional-justice-specific reparation goals.

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significance and can therefore be disregarded in this context, HRC, *Report of the Special Rapporteur on Transitional Justice*, A/HRC/30/42, para 21.

1328 Generally, one can assume that the more personal relevance a mechanism assumes for a survivor, the more satisfaction it provides them. Different factors influence personal relevancy, including the instances the truth commission or prosecution cover, the credibility of the truth uncovered, the individuals prosecuted and the degree of participation of survivors, cf. Lawry-White, *The Reparative Effect of Truth Seeking in Transitional Justice*, 152, 165 ff.

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In response, one should raise the threshold of harm above which survivors receive material reparation. If, after the balancing exercise, their claim to reparation is so limited that it could not serve its purposes, they should receive symbolic reparation only. Raising the threshold is not only supported by a sound teleological and systemic interpretation of the right to reparation but also preserves reparation's adequacy. As discussed above, adequacy opens reparation to considerations of context. If the context of reparation changes so that the usual measures fail to further corrective justice, undermine that aim in other cases, and endanger the goals of the transition, they become inadequate.[1329] Besides, social psychology and sociology might support this position, even though due to the author's lack of knowledge in this area, this is advanced as an idea rather than an argument. While details are unsettled, speaking very generally, individuals assess their happiness and feelings of deprivation in relation to others. The reference group(s) with which an individual compares their situation influence their situation assessment.[1330] During systematic human rights violations, the comparison probably yields different results than under "normal" circumstances. It is fair to speculate that a survivor weighs a violation of their right to freedom of expression differently when most people around them lead tranquil lives as opposed to when other people get killed and tortured. If the subjective gravity of harm partially depends on the circumstances, this context-dependency could justify raising the gravity threshold for material reparation in response to systematic human rights violations.

Lastly, the position can also rely on practice. Many states address satisfaction to a broader circle of survivors than those eligible for the reparation programs.[1331] International jurisprudence redeems small quantities of harm,

1329 For similar considerations concerning individual material awards being "disproportionate to what could be achieved", ICC, *Ntaganda Reparations Order*, ICC-01/04-02/06-2659, para 194.

1330 Muffels, *Relative Income and Reference Group Behavior*, in: Michalos (ed.), *Encyclopedia of Quality of Life and Well-Being Research,* 2014, 5446; Frey, *Economics of Happiness*, 2018, 26; Schulze/Krätschmer-Hahn, *Relative Deprivation Theory*, in: Michalos (ed.), *Encyclopedia of Quality of Life and Well-Being Research,* 2014, 5443; Merton, *Contributions to the Theory of Reference Group Behavior*, in: Merton (ed.), *Social Theory and Social Structure,* 1968, 279, 281 ff., 295 f.

1331 Colombia and Sierra Leone are a case in point, see above, ch. 2, B.IV.1.a., C.IV.1. Generally, it is difficult to cite certain instances of state practice as evidence of this approach, since states rarely give detailed reasons, why they choose to implement certain reparation measures over others. Still, many reparation efforts comprise measures of satisfaction directed at much broader survivor populations than those

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even if material, through declaratory judgments only.[1332] Such judgments are a form of satisfaction. There is no reason why other forms of satisfaction should not fulfill the same function. On the contrary, the main feature distinguishing declaratory judgments from other forms of satisfaction – namely that such judgments stem from a third party instead of the responsible state – speaks in favor of granting the same function to other satisfaction measures. Measures coming from the responsible state can be more effective in communicating acknowledgment, non-repetition, etc. International jurisprudence, therefore, concords with letting satisfaction suffice to remedy small quantities of harm.[1333] While international bodies hold that other remedies must complement satisfaction, if the violation and harm are severe,[1334] it has been demonstrated above that the principles of effectiveness, systemic integration, adequacy, and – maybe – the context-dependency of the subjective assessment of the gravity of harm dispense with that requirement.

In sum, harm considerably less severe than that suffered by the average survivor population can be redressed exclusively through satisfaction. The exact determination of that relatively loose threshold depends on survivors' harm and the balancing exercise described above. Those survivors can be redressed through satisfaction only, whose claim to material reparation is limited to the degree that it cannot serve reparation's purposes anymore.

3. Summary

The preceding section evinced that while not initially conceived for such situations, the international law on reparation can still guide them when interpreted accordingly. States must still strive towards achieving full reparation with the limited resources the balancing exercise leaves for reparation. They must attempt to erase all harm as far as possible through restitution,

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covered by the core reparation program. These often consist of apologies and memorialization, e.g. through a national day of victims, see e.g. Shelton, *Remedies in International Human Rights Law*, 383; Burt, *Transitional Justice in the Aftermath of Civil Conflict*, 41 f., 48; ICTJ, *Reparations in Peru*, 8. Likewise, truth commissions often cover a broader range of survivors than the reparation programs proper.

1332 See above, ch. 1, C.II, III.

1333 The IACtHR specifically mentioned that declaratory judgments can constitute "moral satisfaction", placing it in the broader category of satisfaction without distinction, IACtHR, *Victor Neira-Alegría et al. v. Peru (Reparations and Costs)*, para 56.

1334 IACtHR, *Victor Neira-Alegría et al. v. Peru (Reparations and Costs)*, para 56; IComJ, *Practitioners' Guide*, 208.

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compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The problem remains that states often will not have the means to provide meaningful material reparation to every survivor. States must limit the financial scope of reparation programs accordingly by balancing the aggregate claims for reparation with competing rights and interests. After distributing the resulting cuts equally among survivors, some who suffered lesser harm inevitably have their claim reduced to close to zero. To still award them minimal material reparation would undermine both purposes of reparation in transitional justice: Minimal material reparation neither furthers corrective justice nor does it contribute to strengthened respect for human rights or the trustworthiness of state institutions and members of society. For that reason, survivors who would not get any meaningful material reparation can be repaired through symbolic means only. That way, they can render meaningful symbolic reparation to a large number of survivors at a relatively small cost and retain material benefits for cases in which they have a reparatory effect.

4. Challenges

Relying mainly on an enhanced role of satisfaction to prevent the dilution of reparation can be challenged in two related ways. First, one could argue that the lofty concept of a raised harm threshold below which symbolic measures suffice to remedy material harm substitutes one arbitrary distinction with the next. Instead of dividing eligible and ineligible survivors, one now distinguishes between survivors that suffered just enough harm to be repaired materially and those that did not suffer quite enough to deserve material reparation – and hence must be satisfied with an apology. Indeed, the concept presented here makes precisely that distinction necessary. To make matters worse, the distinction is similar to the one currently drawn between eligible and ineligible survivors. Usually, only survivors of the supposedly gravest violations are eligible for reparation. Since the amount of harm a violation caused also determines its gravity, the group of ineligible survivors and the proposed group of survivors eligible for symbolic measures only will likely largely overlap in practice. It would also be false to claim that the distinction proposed here will be easier to draw in practice. Given that harm is a vague concept, some cases' categorization as being above or below the threshold will be arbitrary. Again, much must be left to a political process; the law cannot reach the precision one would wish for in such complex circumstances as the transitional situation. It can again provide a language to justify, criticize and challenge certain decisions. But so could the concept currently in use

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of deeming only survivors of the gravest human rights violations eligible for reparation. So why switch? Even though the two concepts' practical effects might not differ starkly, distinguishing between survivors receiving material reparation or not is anchored more firmly in the international law on reparation. The distinction between the severity of harm suffered is inherent in the international law on reparation. Distinguishing between eligible and ineligible survivors is not. That fact should not only provide lawyers and other firm believers in the intrinsic value of legal reasoning with good reasons to switch to the distinction proposed here. Its compatibility with the international law on reparation also makes for a wholly different message, much more adequate to further the aims of transitional justice. Instead of conditioning human rights enforcement on the availability of resources, awarding all survivors with some form of reparation reinforces the message of validity, applicability, enforceability, and importance of human rights. It can contribute to making state institutions and members of society trustworthy instead of disappointing survivors' normative expectations again.

This hopeful sentiment leads directly to the second challenge: Can it really? Is meager symbolic reparation not bound to disappoint survivors? Not necessarily. The power of symbolic reparation should not be underestimated. If implemented well, they can recognize survivors' suffering, repair social relations and overcome substantial harm. Thereby, they can trigger strong emotions and attain a high significance for survivors and societies as a whole.[1335] This power was summarized nicely by Hamber and Wilson:

> *"[S]ymbolic acts of reparation such as reburials, and material acts of reparation such as payments, serve the same end. Both these forms of reparation can […] play an important role in processes of opening space for bereavement, addressing trauma and ritualizing symbolic closure. They acknowledge and recognize the individual's suffering and place it within a new officially sanctioned history of trauma. Symbolic representations of the trauma, particularly if the symbols are personalized, can concretize a traumatic event, and help reattribute responsibility. The latter stage is important because labelling responsibility can appropriately redirect blame*

1335 Brown, *Commemoration as Symbolic Reparation - New Narratives or Spaces of Conflict?*, 2013 Hum. Rts. Rev. 14(3), 273, 280 ff.; Greeley et al., *Repairing Symbolic Reparations - Assessing the Effectiveness of Memorialization in the Inter-American System of Human Rights*, 2020 Intl. J. Transitional Just. 14(1), 165. Specifically on memorials, Buckley-Zistel/Schäfer, *Memorials in Transitions - Kollektive Formen des Gedenkens*, in: Mihr et al. (eds.), *Handbuch Transitional Justice,* 2015, 45, 57 ff.

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towards perpetrators and relieve the moral ambiguity and guilt survivors often feel."[1336]

The inverse case of inadequate symbolic reparation measures also demonstrates symbolic reparation's power. As mentioned before, the IACtHR caused public outcry and vandalism when it ordered the commemoration of persons killed in a prison riot. It failed to consider that the particular form of commemoration it chose to order communicated that those killed in the riot should be honored on par with the persons they might have killed when fighting for the guerilla Sendero Luminoso.[1337] Symbolic reparation can move people – for better or worse. In addition, it is not one symbolic reparation measure that adequately repairs survivors. An array of different symbolic measures tailored to the context can have the desired effect. Other than distinguishing between eligible and ineligible survivors, repairing some survivors symbolically only thus counts on a firm basis in the international law on reparation. It communicates the validity, applicability, enforceability, and importance of all human rights instead of undermining that message, contributing to the trustworthiness of state institutions and members of society. Most importantly, it can provide meaningful reparation to all survivors instead of denying them their rights.

F. Procedure

With the content of reparation treated at length, the focus can now turn to the procedural site of reparation programs. This area is of lesser normative relevance. The right to an effective remedy as the basis of the right to reparation is an obligation of result. As such, it is more concerned with the outcome of reparation than with the procedure leading up to it. As the principal right addressing procedural issues, the right to a fair trial is not directly applicable to reparation claims against the state. It covers criminal and civil proceedings, not procedures to remedy a violation of a human

1336 Hamber/Wilson, *Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies*, 2002 J. Hum. Rts. 1(1), 35, 38.

1337 See above, C.II.1. A further negative but highly interesting example of the power of symbolic measures is Anderson's account of how colonial powers sought to redefine the meaning of existing monuments of the culture of colonialized subjects so that they served their ends, Anderson, *Imagined Communities - Reflections on the Origin and Spread of Nationalism*, 2nd Revised Edition 2016, 179 ff.

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right.[1338] Nevertheless, the two rights are closely connected: A remedy cannot be effective if it does not comply with fundamental due process rights. These are hence read into the effectiveness criterion of the right to an effective remedy.[1339] Thus, while not requiring such strict procedural safeguards as the right to a fair trial[1340], the right to an effective remedy is not indifferent to procedure. This affects the prioritization of certain survivors in the process (I.), survivor participation (II.) and other due process issues (III.).

I. Prioritization

The caseload administrative reparation programs face warrants a conscious decision on the sequence in which to handle applications. The reparation programs studied in chapter two prioritized vulnerable survivors. Such prioritization can ensure that survivors who can better mitigate delays carry a greater share of the burden of prolonged proceedings. As seen above, the right to an effective remedy, incorporating basic notions of fair trial, demands that reparation proceedings do not become excessively long. While the exceptional circumstances in transitional justice can justify a delay, the state must do everything in its power to make proceedings as expeditious as possible. It must also account for the vulnerabilities of applicants.[1341] Accordingly, the ECtHR held that under conditions of a temporary backlog due to exceptional circumstances, states could prioritize applicants based on their vulnerability and their case's urgency.[1342] In some instances, the IACtHR and ECtHR

1338 Doswald-Beck, *Fair Trial, Right to, International Protection*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Online Edition 2013, para 1. This already becomes apparent from the French wording of Art. 14 ICCPR, speaking of "droit et obligations de caractère civil" and Art. 6 ECHR. Badawi El-Sheikh, *Preliminary Remarks on the Right to a Fair Trial Under the African Charter on Human and Peoples' Rights*, in: Wolfrum/Weissbrodt (eds.), *The Right to a Fair Trial,* 1997, 327, 331.

1339 HRCom, *Rawle Kennedy v. Trinidad and Tobago*, CCPR/C/74/D/845/1998, 845/1998, 2002, para 7.10, 8; IACtHR, *Velásquez-Rodríguez v. Honduras (Preliminary Objections)*, 1987, para 91; ECtHR, *Scordino v. Italy (No. 1)*, 36813/97, para 195 ff.; HRCom, *Anthony Currie v. Jamaica*, CCPR/C/50/D/377/1989, 377/1989, 1994, para 13.4; IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 9; IAComHR, *Compendium,* OEA/Ser.L/V/II.Doc. 121, para 178; Schmitt, *Access to Justice and International Organizations*, 96 f.

1340 ECtHR, *Geouffre de la Pradelle v. France*, 12964/87 (Chamber), 1992, para 37.

1341 See above, E.II.4.a.

1342 ECtHR, *Zimmermann and Steiner v. Switzerland*, 8737/79 (Chamber), 1983, para 29.

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demanded particular attention to especially vulnerable applicants, including their prioritization in proceedings.[1343] This finds support in state practice.[1344] Hence, when vulnerable survivors face excessively long reparation proceedings, the state must prioritize their reparation applications.

II. Participation

Participation of survivors is widely regarded as a hallmark of the quality and legitimacy of a reparation program.[1345] Giving survivors a voice in creating and implementing reparation measures ensures that their needs and views are accounted for. It goes a long way towards making reparation adequate.[1346] Participation also furthers the transitional justice process. When the state engages in a dialogue with survivors on equal footing, it underlines the sincerity of its agenda to ensure that their human rights are valid, applicable, enforceable, and important again. Actively engaging with the recipients of that message will also enhance its effectiveness since the state can ensure that survivors understand the message as intended. Participation can thereby significantly contribute to fostering generalized trust.[1347] Still, while strongly supported by teleological considerations, a right to participation is difficult to establish.

Such a right has a solid legal basis only when it comes to determining eligibility for a reparation program. Since a state entity decides on a claim to

1343 IACtHR, *Furlan and Family v. Argentina*, 2012, para 196; ECtHR, *Codarcea v. Romania*, 31675/04 (Third Section), 2009, para 89; ECtHR, *Mocie v. France*, 46096/99 (Second Section), 2003, para 22.

1344 Cammack, *Reparations in Malawi*, 233; Colvin, *Overview of the Reparations Program in South Africa*, 189; Houtte et al., *The UNCC*, 341 f.; ICTJ, *Transitional Justice in Morocco*, 16; ICTJ, *Reparations in Peru*, 16; Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, 2007 para 9.1.

1345 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 74 ff.; OHCHR, *Reparation Programmes*, 15 f.; IACtHR, *Yarce et al v. Colombia*, para 326; AU, *Transitional Justice Policy,* 2019, para 32; ACtHPR, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations,* 2019, 68.

1346 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 74 ff.; OHCHR, *Reparation Programmes*, 15 f.; Beristain, *Diálogos Sobre la Reparación – Experiencias en el Sistema Interamericano de Derechos Humanos,* Vol. I, 2008, 441 f.

1347 Wong, *How can Political Trust be Built After Civil Wars?*, 775 f.

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reparation during that process, the process must adhere to fundamental due process rights. Among these is the right to be heard, which entails the right to adduce evidence and present one's case.[1348] Denying survivors the right to participate in that phase of the process would not only violate their due process rights it would also render the reparation program ineffective.

Many soft-law documents and some international judgments support a broader right to participation in reparation programs, encompassing involvement in its creation and implementation.[1349] The legal basis of such a right is unclear. It does not arise from the right to take part in public affairs and political decision-making as enshrined in Art. 25 ICCPR. This right does not encompass an individual right to be consulted for specific political questions. Rather, it ensures individuals access to the general public discourse.[1350] Despite the mentioned soft law documents, state practice does not provide much support for such a right either. Many reparation programs offer little opportunity for participation from the outset or cut existing participatory mechanisms at will.[1351]

1348 IACtHR, *Barbani Duarte et al. v. Uruguay*, 2011, para 122; ECtHR, *Perez v. France*, 47287/99 (Grand Chamber), 2004, para 80; ECtHR, *Clinique des Acacias et Autres v. France*, 65399/01 (Third Section), 2005, para 37; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle A(2)(e).

1349 IACtHR, *Yarce et al v. Colombia*, para 326; IACtHR, *Street Children Case (Merits)*, para 225, 227; ECOSOC, *Impunity Principles*, E/CN.4/2005/102/Add.1, principle 32; AComHPR, *GC 4*, para 18, 70; ECOSOC, *Pinheiro Principles*, E/CN.4/Sub.2/2005/17 Annex, principle 14.1 f.; General Congress of the United Mexican States, General Victims Act, art. 7(XVI).

1350 HRCom, *Marshall v. Canada*, CCPR/C/43/D/205/1986, 205/1986, 1991, para 5.4 ff.; HRCom, *André Brun v. France*, CCPR/C/88/D/1453/2006, 1453/2006, 2006, para 6.4; HRCom, *Nicole Beydon and Others v. France*, CCPR/C/85/D/1400/2005, 1400/2005, 2005 para 4.5.

1351 ICTJ, *Dealing With the 2006 Internal Displacement Crisis in Timor-Leste*, 14 f.; ICTJ, *Transitional Justice in Morocco*, 16 f.; Guillerot, *Reparations in Peru*, 35; ICTJ, *Reparations in Peru*, 12 f., 15; Federal Assembly of the Swiss Confederation, Federal Act on Compulsory Social Measures and Placements Prior to 1981, art. 18(2); Sharma et al., *From Relief to Redress*, 40; Martínez/Gómez, *A Promise to be Fulfilled*, 20, 25 f.; Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 156. South Africa explicitly denied a right to participation, Colvin, *Overview of the Reparations Program in South Africa*, 202. The AU's transitional justice policy tellingly refrains from phrasing participation as a right, AU, *Transitional Justice Policy,* 2019, para 32 f. Even the inter-american human rights bodies, generally strong supporters of survivor participation, do not always grant it, Contreras-Garduno, *Collective Reparations, 146 f.;* IACtHR, *Case of the Dismissed Congressional Employees v. Peru, Order of the IACtHR of November 20, 2009,* 2009, para 17, concerning the composition of a commission whose creation the court ordered as reparation. For

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It could be argued that providing survivors opportunities to participate in reparation programs is simply necessary to provide adequate reparation. However, as determined in chapter one, whether reparation measures are adequate is not primarily judged against survivors' views but evaluated objectively.[1352] There might be clear-cut situations in which the proper reparation measures are obvious without survivor participation. The mass ouster of public servants after an authoritarian regime came to power might be an example. As long as no complicating factors exist, such cases seem to be repaired adequately by reinstatement and/or compensation for lost earnings. Hence, it cannot abstractly be determined that survivor participation is necessary for the adequacy of reparation. Especially given the discretion states enjoy when devising adequate reparation measures that might not always be the case. The validity of the necessity argument, therefore, depends on the concrete situation and envisaged measure. It only places an obligation on the state to seek survivor participation to the degree necessary to devise adequate reparation measures. It does not necessarily give individual survivors the right to participate.

Regardless of a legal right to participate in reparation programs, it must be stressed that robust survivor participation is a critical strategy to devise good and effective reparation programs. Thus, while not necessarily a legal obligation, states are well-advised to make room for as much survivor participation as possible.[1353]

III. Due Process

The nexus between the right to an effective remedy and the right to a fair trial adds numerous other considerations to reparation programs in transitional justice situations, not all of which can be examined. Applicants' rights to an adversarial process, equality of arms, a reasoned decision, etc., can all become relevant mutatis mutandis for administrative reparation programs.[1354] In

programs granting survivors a right to participation see HRC, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence,* A/HRC/34/62, 2016, para 58.

1352 See above, ch. 1, C.VI.

1353 See in more detail below, Conclusion, F.

1354 Generally on the scope of the right, ECtHR, *Guide on Article 6 of the European Convention on Human Rights*, 2019; Ibáñez Rivas, *Artículo 8*, in: Steiner et al. (eds.), *Convención Americana Sobre Derechos Humanos - Comentario,* 2nd Edition 2019,

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general, it can be assumed that these rights can be limited to a much larger degree than under normal circumstances. One must still consider that the right to an effective remedy – as the actual base of administrative reparation programs – is more concerned with outcome than the process. Additionally, the right to an effective remedy can be limited.[1355] Guaranteeing an expeditious remedy, which leads to adequate reparation measures under the challenging circumstances of transitional justice, will require a much greater compromise on the procedural side than usual.

G. Structure

It gradually becomes clear that large-scale reparation programs are a complex endeavor, which requires balancing various factors, considering numerous stakeholders, and catering to a vast universe of survivors. These demanding requirements also affect the structure such reparation schemes must take. The following section examines whether reparation programs must take the form of a special mechanism (I.) and what role the judiciary plays (II.).[1356]

I. An Obligation to Create a Special Mechanism?

The case studies evinced that in transitional justice situations, states resort to special mechanisms to implement reparation – mostly independent administrative programs, whose only purpose is to repair a defined set of survivors. While the right to an effective remedy, on which the right to reparation is based, usually envisages judicial proceedings, it does not preclude administrative forms of providing redress.[1357] This applies especially

256, 268 ff.; On the application of the right to reparation programs, IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 9 f.

1355 See above, B.II.2.a.

1356 I was prompted to think about the following important issues in large part due to the critical comments of my supervisor Claus Kreß during a colloquium, for which I am highly thankful.

1357 ECtHR, *Klass and Others v. Germany*, 5029/71, para 67; CESCR, *General Comment No. 9 - The Domestic Application of the Covenant,* E/C.12/1998/24, 1998, para 9; CESCR, *General Comment No. 16 - The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (Art. 3 of the Covenant),* E/C.12/2005/4, 2005, para 21. The ICCPR gives priority to judicial remedies, but allows for administrative remedies also, HRCom, *José Vicente and Amado Villafañe Cha-*

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to transitional justice situations.[1358] The question is whether states can choose to create special administrative mechanisms to repair survivors in transitional justice or if they are obliged to deploy them.

The previously mentioned character of the right to reparation as an obligation of result speaks against obliging states to deploy special reparation mechanisms. States need to deliver adequate reparation. By which means they do so is their prerogative. Under the unique circumstances of transitional justice, one must doubt, though, whether a regular justice system can deliver adequate reparation. It is reasonable to assume that ordinary administrative procedures or courts are in no position to engage with all the considerations mentioned above satisfactorily – conducting comprehensive outreach, removing barriers to access justice, taking into account evidentiary problems, engaging in broad balancing, etc. Especially broadly balancing a wide array of different interests, many of which concern the state budget, will strain any standard procedure's ability. Beyond remedying the ordinary justice system's factual constraints, special reparation programs have other advantages. Among others, they can be quicker, less adversarial, use resources more effectively, and pose fewer risks for survivors.[1359] They do not disaggregate survivors into individual cases, which can easily let the structural component of systematic human rights violations fade from view. This would inhibit the effective reach of reparation's transitional-justice-specific purpose.[1360] Thus, a procedural obligation to plan and implement a special reparation mechanism will most often be a necessary corollary of the substantive obligation to make adequate reparation. Whether that special mechanism is an administrative reparation program, a special court, or another procedure falls within the state's discretion. Again, the state owes the result of fulfilling the standards of this chapter. As long as the reparation mechanism can do that, its concrete organizational features are of secondary concern.

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parro and Others v. Colombia, CCPR/C/60/D/612/1995, 612/1995, 1997, para. 5.2; Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*, 2nd Revised Edition 2005, art. 2(3) para 65; ECtHR, *Ramirez Sanchez v. France*, 59450/00 (Grand Chamber), 2006, para 159, 165; AComHPR, *GC 4*, para 23.

1358 IACtHR, *Operation Genesis v. Colombia*, para 470; ECtHR, *Broniowski v. Poland*, 31443/96 (Grand Chamber), 2004, para 43; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle P(d); HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 31 ff., providing a list of examples.

1359 de Greiff, *Justice and Reparations*, 160.

1360 de Greiff, *Justice and Reparations*, 458 f.

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II. The Role of the Judiciary

The procedural obligation to create a special reparation mechanism does not take the regular judiciary out of the picture entirely. Practice in transitional justice usually follows one of three model relationships between the judiciary and special reparation mechanisms. First, any recourse to courts can be precluded, channeling all reparation efforts through the special mechanism.[1361] Second, seeking primary redress in court can be precluded, but judicial oversight, e.g., of decisions denying eligibility for the reparation program, can be granted.[1362] Third, individual procedures against the state are allowed as primary redress so that courts and the administrative program function in parallel.[1363] The question is whether there are any legal obligations to choose or refrain from choosing any of those relationships (1.). If states grant a role to courts, the further question arises, which standards courts should employ – the transitional-justice-specific standards of this chapter or usual tort standards (2.).

1361 De facto, this was the case in Sierra Leone, see above, ch. 2, B.

1362 Cammack, *Reparations in Malawi*, 221; Asamblea General de Uruguay, Ley No 18.596, art. 22; Guillerot, *Reparations in Peru*, 19 f.; Chile and Argentina can partially serve as an example of this model, Guembe, *The Argentinean Experience*, 31, 40; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 56. For further explanation see the next fn.

1363 Lira, *The Reparations Policy for Human Rights Violations in Chile*, 87 ff.; Guembe, *The Argentinean Experience*, 26. In Argentina as well as in Chile the exclusion of law suits was not complete. In Argentina it depended on the limb of the reparation program and in Chile different courts handled the question differently. Cano/Ferreira, *The Reparations Program in Brazil*, 116; Houtte et al., *The UNCC*, 368; Martínez/Gómez, *A Promise to be Fulfilled*, 30 ff.; UNGA, *Basic Principles*, A/RES/60/147, para 12; IAComHR, *Reparation Guidelines*, OEA/Ser/L/V/II.131, para 5. Since this study deals with state responsibility only, it will not cover civil suits against perpetrators. Generally, the state's responsibility is independent of that from individual perpetrators. Hence, the state owes the full amount of reparation. At the same time, survivors cannot claim more redress than the harm they suffered. Therefore, they should not have a claim against the perpetrator or state, if the other already repaired them. This creates a tension, as a responsible actor might be relieved from their obligation to repair. In practice however, the problem will rarely become salient, as perpetrators usually do not have the means to repair all survivors they owe reparation to. A possible pragmatic solution would be for states to repair survivors and establish mechanisms through which perpetrators contribute to the reparation program. Such a mechanism is proposed by UNGA, *Basic Principles*, A/RES/60/147, para 16.

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1. The Relationship Between Special Reparation Mechanisms and the National Judiciary

Generally, states are free to organize their national justice system how they see fit, as long as it provides effective remedies to survivors.[1364] Thus, if each component of the system adheres to the standards elaborated in this chapter, states can let the special mechanism and the ordinary judiciary function parallel, each being a possible primary avenue for redress.[1365] They are also free to condition access to courts on turning to an administrative procedure first, e.g., a reparation program.[1366] If that procedure remedies the harm incurred, any subsequent lawsuit has no merit anymore. States are thus free to reduce the role of courts to that of judicial oversight. International jurisprudence is split on whether the right to an effective remedy requires some sort of judicial oversight at some point or whether a purely administrative procedure – such as an administrative reparation program – can suffice.[1367] Even those bodies that let an administrative procedure

1364 ECtHR, *Silver and Others v. United Kingdom*, 5947/72 (Chamber), 1983, para 113.

1365 This is the model the inter-american human rights system envisages, IACtHR, *Ordenes Guerra y Otros v. Chile,* 2018, para 99 ff.; IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 96 ff. As said before, courts will most often have difficulties in meeting the standards elaborated in this chapter. It is conceivable though that with the caseload somewhat lifted by a reparation program, they are better placed to apply the standards. Furthermore, states might decide to relegate a specific subset of the survivor population to the courts, whereas other survivors must turn to the special mechanism first. While not using this exact model, Colombia came close to it by relying heavily on courts for land restitution, whereas for other reparation measures, courts played a much more subsidiary role.

1366 See above for the example of Colombia, e.g. ch. 2, C.IV.1.; Cammack, *Reparations in Malawi*, 228. For numerous decision with a bearing on human rights, states set up such proceedings. In the realm of asylum claims the ECtHR considered the judicial review of administrative decisions an effective remedy, ECtHR, *Vilvarajah and Others v. United Kingdom*, 13163/87 (Chamber), 1991, para 125 ff. The IAComHR differs in this respect, arguing that Art. 8(1) and 25(1) ACHR demand the possibility to be heard by a court and have a judicial determination of responsibility, IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 102. It was argued above, F., why the standards of the right to a fair trial in Art. 8(1) ACHR are not as exacting in the context of reparation proceedings. It is not clear, why there needs to be a judicial establishment of state responsibility, if a state acknowledges responsibility through a reparation program, also for the concrete instance to be repaired, as is necessary for a benefit to constitute reparation, see above Introduction, C. and Ch 4 E.II.3.

1367 Demanding a judicial remedy, IAComHR, *Access to Justice*, OEA/Ser.L/V/II.129, para 16, 164 ff., 190 ff. The IAComHR sees an additional role of the national judiciary to secure reparation from individual perpetrators, IAComHR, *Reparation Guidelines*,

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suffice demand a judicial proceeding, however, if it is the only way to safeguard an essential right.[1368] The large caseload in transitional justice situations and the consequential need for categorization, swift proceedings, and standardization produces an inherent risk of wrong decisions, especially concerning atypical cases. The special vulnerability of large parts of the survivor population, the inherent complexity of their cases, scarcity of evidence, and other difficulties accompanying the transitional justice situation make robust procedural guarantees all the more important. Hence, judicial oversight should be considered necessary to guarantee the effectiveness of the remedy provided. State practice supports this view, as states rarely preclude judicial oversight of administrative reparation programs' decisions.[1369] Thus, even according to the less restrictive view, administrative reparation programs must be subject to the possibility of judicial oversight. Taking courts out of the picture entirely is, therefore, no option. Regarding the remaining two models mentioned initially, teleological considerations heavily favor the judicial oversight model over parallelism. Comprehensive administrative reparation programs provide a complete picture of the survivor universe, send a consistent message of validity, applicability, enforceability, and importance of human rights, and reduce overhead costs. Opening the court route as a primary means of redress would severely undercut any reparation program's comprehensiveness and undermine these advantages.

2. Standards for Adjudication

No matter whether as judicial oversight or as parallel primary redress mechanisms, if courts get involved in repairing systematic human rights violations, the question arises, which legislative standards they should

OEA/Ser/L/V/II.131, para 5 f.; IACtHR, *García Lucero et al. v. Chile*, para 190 ff.; CAT, *GC 3*, CAT/C/GC/3, para 20, 30; CEDAW, *General Recommendation No. 33 on Women's Access to Justice,* CEDAW/C/GC/33, 2015, para 53. Unclear: UNGA, *Basic Principles*, A/RES/60/147, para 12; AComHPR, *GC 4*, para 23; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle C(c). Administrative redress is sufficient for HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 15; CESCR, *GC 9*, E/C.12/1998/24, para 9; ECtHR, *Broniowski v. Poland*, 31443/96, para 43.

1368 ECtHR, *Ramirez Sanchez v. France*, 59450/00 para 165; CESCR, *GC 9*, E/C.12/1998/24, para 9.

1369 Cammack, *Reparations in Malawi*, 224; Colvin, *Overview of the Reparations Program in South Africa*, 124, 129; Guembe, *The Argentinean Experience*, 32, 40, 43; Guillerot, *Reparations in Peru*, 20.

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employ. Most courts stick to established principles to determine the amount of reparation due. They treat individual cases before them as normal torts. Consequently, they award much higher material reparation than the parallel special reparation mechanisms. On the international plane, the IACtHR usually follows this example.[1370] Some courts deduct reparation previously awarded by the program from their awards. Others do not take reparation programs into account at all.[1371] These positions result in survivors who go to court receiving multiple amounts of the reparation others receive from the reparation program.

a. Business as Usual: Tort Standards

Malamud-Goti and Grosman justify this result. They argue that it would be unjust if survivors of state violence were foreclosed from the possibility to achieve full reparation, while persons who suffered harm on a different occasion can still claim it.[1372] Yet, as was shown above, lowering the amount of reparation awarded is no choice states can freely embark upon, and courts can refuse to make. It is a matter of resolving a normative conflict that arises in the circumstances of transitional justice. Hence, there is a decisive difference between survivors of systematic human rights violations and "normal" plaintiffs, whose claim does not affect other legal positions to the same degree. The law does not allow courts to treat instances of systematic

1370 See for the example of Guatemala Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 160. The IAComHR stated that the state can adopt measures ensuring that the parallel functioning of administrative reparation programs and courts does not overwhelm the national treasury. This could hint at the possibility to oblige courts to take into account amounts received by an administrative program or to use the same standards as administrative programs. Unfortunately, the commission does not clarify, IAComHR, *Ordenes Guerra and Others v. Chile, Merits Report,* 52/16, 2016, para 99; IAComHR, *Principal Guidelines for a Comprehensive Reparation Policy,* OEA/Ser/L/V/II.131, 2008, para 5. The latter option would make courts superfluous though, as survivors had no incentive to turn to the more strenuous procedure.

1371 Cano/Ferreira, *The Reparations Program in Brazil*, 124 f., 129, 146; IACtHR, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil*, 2020, para 305 itself deemed national reparation awards irrelevant, whereas the commission considered it possible for states to deduct the awards from administrative programs from the reparation it awarded, IAComHR, *Integrantes y Militantes de la Unión Patriótica, Merits Report*, 170/17, 2017, para 1602.

1372 Malamud-Goti/Grosman, *Reparations and Civil Litigation*, 547 ff.

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human rights violations as normal torts because they are no normal torts. The contrary approach not only ignores the normative conflict at play but would also yield unfair results. It would necessarily create hierarchies between survivors on other bases than the harm they suffered. Even more than under normal circumstances, access to courts is not evenly distributed in transitional situations. A person's position in society influences how easily they can avail themselves of the protection of courts. Allowing normal tort cases parallel to reparation programs would mainly allow privileged survivors to go to court and receive more reparation than others.[1373] Solving this problem through structural reform of the judicial system[1374] simply substitutes that problem with another: If all survivors had access to courts and received amounts akin to those of "normal torts", the state would be unable to satisfy all claims. This would substitute the competition between survivors with and without access to courts with a competition between survivors with quicker and less quick access to courts. Of course, the state could give survivors incentives to choose the reparation program over judicial proceedings because the former is quicker, provides higher chances of success, etc.[1375] But that would be unjust too. First, the survivors' right to access justice demands that judicial proceedings must not be too burdensome. A too-large disparity between court proceedings and reparation programs is therefore not legally possible. Second, such benefits are only appealing if a survivor cannot offset a court procedure's disadvantages. Given that the survivor population almost always contains highly marginalized, indigent individuals, it seems implausible that the choice between court proceedings and reparation programs is a free one. Again, hierarchies would be created between survivors, not based on their harm, but probably their social position, education, etc.

No matter the proposed fixes, the entire system of allowing tort proceedings parallel to special reparation mechanisms must rely on some survivors being unable to access the former. The approach must therefore rely on unjust

1373 OHCHR, *Reparation Programmes*, 35; de Greiff, *Articulating the Links Between Transitional Justice and Development* 44 f.

1374 This is the response offered to the challenge of unequal access to court by Malamud-Goti/Grosman, *Reparations and Civil Litigation*, 549.

1375 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 4. The IAComHR seems to have that solution in mind, hinting at the fact that survivors might deserve more reparation after court proceedings, because they took on a higher risk and burden, IAComHR, *Compendium,* OEA/Ser.L/V/II.Doc. 121, para 177, citing IAComHR, *Integrantes y Militantes de la Unión Patriótica, Merits Report*, 170/17, 2017, para 1601.

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and arbitrary hierarchies between survivors. Of course, one could object that this cannot be an argument for giving everyone less. But it is the more just solution to seek a fair balance between all competing claims on the state's resources than to rely on disparities within the survivor community to make reparation possible. Hence, if courts adjudicate reparation claims in transitional situations, they must bow to its factual constraints and refrain from using the ordinary tort approach.[1376]

b. Keeping up With the Times: Transitional Justice Standards

Instead, courts must follow the model created here, removing barriers to access, aggregating all potential claims to reparation the state faces, and balancing them against other claims. There are two problems with that position. First, some of the obligations posited in this chapter only arise because the state must consider all survivors' positions and their aggregate effect. It is not apparent why courts should consider the reparation claims of persons not appearing before them as claimants. Second, even if they had to, they would be unable to do it in most cases. Courts will rarely have the capacity to adjudicate on all obligations posited in this chapter. They often do not have the epistemic abilities to adequately capture barriers to access to justice, to balance all competing positions, etc. When answering these two challenges, three scenarios must be distinguished. In the first, a state already implemented a national mechanism and reduced courts' role to that of judicial oversight. In the second, courts function as a primary avenue of redress parallel to an existent special reparation mechanism. In the third scenario, the state did not take any action, so that courts are the primary and only means of redress.

In the first scenario, neither challenge is that pressing. If an individual appeals the decision of a special reparation mechanism, e.g., because they deem their reparation inadequate, the court can evaluate whether the reparation program adhered to the standards set in this chapter. In this assessment, the court must automatically consider whether the reparation mechanism struck a fair balance between all competing positions. Otherwise, the limitation of the right to reparation of the individual claimant was disproportionate. As

1376 Malawi's National Compensation Tribunal, set up as a special mechanism to deal with the legacy of authoritarianism, recognized the difficulties in following the tort approach when deliberately awarding lower amounts of reparation than was done by ordinary courts earlier, because otherwise the government would run out of funds, Cammack, *Reparations in Malawi*, 236.

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the ECtHR held in a case concerning reasonable limitations on compensation for dispossession:

> *"The vast number of persons involved – nearly 80,000 – and the very substantial value of their claims (...) are certainly factors that must be taken into account in ascertaining whether the requisite 'fair balance' was struck."*[1377]

As was argued above, courts must give states deference in these questions.[1378] In this context, the epistemic justification for deference is especially salient, as courts are simply unable to evaluate the state's decision to the last bit. Judicial oversight must only consider whether the state's policy choices are reasonable and whether all other obligations discussed in this chapter were complied with, including, e.g., whether reparation was awarded in a non-discriminatory manner.

In the second and third scenarios, this reasoning provides no basis for applying this chapter's standards to individual court cases. In the third scenario, there is no special mechanism for the court to evaluate. The second scenario does not require the court to do so because it is a primary avenue for redress parallel to the reparation mechanism. In either case, the court must decide independently what constitutes adequate reparation in the single case. This creates the paradoxical situation that each case the court faces does not run into a normative conflict based on limited resources: The state can provide a substantial amount of reparation to any single survivor. But if the court decides each case according to standard tort principles, the state cannot provide a substantial amount of reparation to every single survivor. Deciding cases without regard to their aggregate effect would therefore be unsustainable. It would force the courts to treat later cases differently because, at one point, the resource question would become acute, and the court would impose a disproportionate financial burden on the state. Equality before the law and the principle of legal certainty – both central elements of the rule of law – demand consistency in judicial decisions. They protect legitimate expectations of an applicant that courts follow their previous decisions on similar matters.[1379] While that does not mean that a change in adjudication is impossible, it strongly suggests that courts should not embark upon lines

1377 ECtHR, *Broniowski v. Poland*, 31443/96, para 162.

1378 See above, B.III.

1379 ICJ, *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya / Malta) - Judgment of 3 June 1985*, I.C.J. Reports 1985, 13, para 45; ECtHR, *Nejdet Şahin and Perihan*

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of adjudication, which from the outset they cannot sustain for future cases. Otherwise, they foreseeably force themselves to apply the law unequally and inconsistently. Thus, when called upon as a primary avenue of redress, courts must apply all the considerations enumerated so far too. This leads again to the practical challenge that courts are in no position to do so in most transitional justice situations. This challenge is surmountable in the scenario in which a special mechanism exists, and courts function as a primary parallel mechanism for redress. If courts are in no position to adhere to all of this chapter's standards, they can orient themselves at the special mechanism and defer to the state's choices it reflects. Deference provides no solution, though for the scenario in which no special mechanism exists that could provide orientation to courts. However, as determined above, if the ordinary justice system cannot adhere to this chapter's standards, states have the procedural obligation to create a special reparation mechanism that can.[1380] Hence, in that scenario, courts can resort to ordering the state to fulfill this procedural obligation. Such an approach is not alien to international law. Often, especially in case of mass violations, international bodies solely order adequate reparation, leaving the means entirely or partially up to the state.[1381] In some instances of mass violations, international bodies directly ordered a state to set up a reparation procedure specifically for that case.[1382]

III. Summary

In sum, the state must create a special mechanism when necessary to deliver reparation following the standards set in this chapter. Courts must exercise judicial oversight over reparation programs, as summed up by the IACtHR:

Şahin v. Turkey, 13279/05 (Grand Chamber), 2011, para 56 f.; ECtHR, *Siegle v. Romania*, 23456/04 (Third Section), 2013, para 38.

1380 See above, G.I.

1381 Oette, *Bringing Justice to Victims?*, 238.

1382 AComHPR, *African Institute for Human Rights and Development (on Behalf of Sierra Leonean Refugees in Guinea) v. Republic of Guinea*, 249/2002, 2004, para 74; AComHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02, 2006, para 215; IACtHR, *Saramaka People v. Suriname*, para 198 ff.; ECtHR, *Kurić and Others v. Slovenia*, 26828/06 (Grand Chamber), 2012, para 412 ff.; CAT, *A v. Bosnia and Herzegovina*, 854/2017, para 9; ACtHPR, *AComHPR v. Republic of Kenya – Judgment on Reparations,* 006/2012, 2022, 8 f.

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> *"[...] national mechanisms [...] should be evaluated and encouraged. If these mechanisms do not [...] properly repair the human rights violations declared by this Court, recognized in the Convention, the Court, in the exercise of its subsidiary and complimentary [sic] competence, should order the appropriate reparations."*[1383]

Beyond that, the state is not obliged to open courts as a primary means of redress but is free to do so. When called upon, either as an oversight or primary avenue to redress, courts should not treat the case before them as an ordinary tort. The demands of a teleological and systemic interpretation of the right to reparation also bind them. Furthermore, treating such cases as ordinary torts creates arbitrary and, therefore, unjust hierarchies between survivors. Instead, courts must adhere to the standards elaborated in this chapter. If they exercise oversight, they can evaluate the state's reparation program as a limitation on the right to reparation and pay deference towards the state's choices. If they are a primary avenue of redress in parallel to a reparation program, they should orient themselves at its standards. If the state's inactivity results in courts being seized as the only means of redress, they should order the state to fulfill its procedural obligation to provide a special mechanism for redress.

H. The End

All good things must come to an end. This holds for reparation programs and the present study. Honoring that fact, the last remaining question for this chapter is how and when states can end reparation programs, either by excluding further applications (I.) or by shutting programs down entirely (II.).

I. Application Deadlines

Most reparation programs surveyed in chapter two imposed a cut-off date after which survivors could not present their claims to the program anymore.

1383 IACtHR, *Gomes Lund v. Brazil*, para 303. This consideration became especially important in the case of Colombia, IACtHR, *Operation Genesis v. Colombia*, 472 ff.; IACtHR, *Yarce et al v. Colombia*, 328, 340.

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This must be distinguished from limiting eligibility because of the time passed since the violation occurred, as discussed above.[1384] Limiting eligibility was based on statutes of limitation. This section concerns time-limits on application to newly created reparation mechanisms, regardless of when the violation occurred. Ample international practice evinces that, in principle, states can impose such time-limits.[1385] These are, however, a limitation on survivors' right to access justice. As such, they must be necessary and proportionate. Imposing time-limits on presenting the initial claim pursues the legitimate aim of facilitating the planning and administration of a reparation program. It ensures that there is a relatively fixed number of survivors to plan for. However, the time-limit must not make survivors' access to the program unrealistic. It must not place unreasonable burdens on them considering their often vulnerable situation. Otherwise, it would be disproportionate.[1386] The aim of gaining security in planning can be reached without having a completely fixed number of survivors to cater to. Small increases will not fundamentally alter the course of the program. For these reasons, time-limits cannot be unreasonably short and must allow for exceptions if survivors had

1384 See above, C.III.

1385 IACtHR, *Velásquez-Rodríguez v. Honduras (Merits)*, para 67; IACtHR, *Case of the Rio Negro Massacre v. Guatemala,* 2012, para 251; IACtHR, *Case of the Mapiripán Massacre v. Colombia,* 2005, para 257; ECtHR, *Guzzardi v. Italy*, 7367/76, para 72; Cammack, *Reparations in Malawi*, 229; Congreso Nacional de Bolivia, Ley 2640, art. 10(f); Congress of the Philippines, Human Rights Victims Reparation and Recognition Act of 2013, sec. 23; Cámara de Diputados de Paraguay, Ley No. 838, art. 1; Federal Assembly of the Swiss Confederation, Reparations Act for Compulsory Social Measures, art. 5; ECOSOC, *Pinheiro Principles*, E/CN.4/Sub.2/2005/17 Annex, principle 13.9. Many states extended the deadlines, introduced exceptions or ultimately abolished them, because not all survivors were able to apply in time: Guembe, *The Argentinean Experience*, 33, 41; Lira, *The Reparations Policy for Human Rights Violations in Chile*, 79, 82. Brazil extended the deadline only for one case due to difficulties in communication, Cano/Ferreira, *The Reparations Program in Brazil*, 115, 126, 134, 141, 146. The UNCC and the reparation program in Northern Ireland had the possibility to consider belated claims, Houtte et al., *The UNCC*, 340; Secretary of State of Northern Ireland, Victims' Payments Regulations 2020, art. 8(2)(b). Morocco did not apply its deadline for unresolved cases of enforced disappearances, ICTJ, *Transitional Justice in Morocco*, 10 f., 16. Peru extended and ultimately abolished its deadline, Burt, *Transitional Justice in the Aftermath of Civil Conflict*, 9; Guillerot, *Reparations in Peru*, 35; ICTJ, *Reparations in Peru*, 17.

1386 HRCom*, Josef Frank Adam v. The Czech Republic*, CCPR/C/57/D/586/1994, 586/1994, 1996, para 11.1; HRCom, *Nyaya v. Nepal*, 2556/2015, para 6.4, 7.9.

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good reason not to present their claim before the deadline.[1387] Furthermore, survivors' ability to submit their claims depends on the intake procedure, including the quality of the outreach, the evidentiary requirements the program imposes, and how it erects or removes other barriers to accessing the program. If the state failed to meet the international standards on intake discussed above, it could not profit from these failures.[1388] Thus, if survivors were unable to present their claim within the initial time-limit because of the state's inability to meet its obligations, they must still be allowed to register.

II. End-Dates

The considerations made so far also answer the question whether and when states can shut down reparation programs. Some programs, including the Colombian one, have a fixed end-date.[1389] States can enforce such an end-date if by that time they adequately repaired all survivors. Alas, that is an unlikely scenario. Some damage might require consistent and prolonged attention, potentially for the rest of the respective survivors' lives. Given that not all survivors need such attention and that the costs of reparation programs will decrease over time, such measures might be necessary even after the broad balancing exercise reduced the scope of reparation for each survivor. Such a scenario precludes an end-date affecting all survivors. Similarly, due to the standards elaborated for time-limits on eligibility and claim prescription, survivors might legitimately present claims well after the program's initial conception, to which the state must respond.

Of course, if only a few survivors are left to be repaired, the state can relegate their reparation to the court system or a residual mechanism. Hence, the question is not so much about whether a reparation program can cease to exist at a specific date. The decisive question is whether, after that date, survivors

1387 More generally, the Special Rapporteur on Transitional Justice demands that time frames for registration be flexible, HRC, *Report on Domestic Reparation Programs*, A/HRC/42/45, para 48. The IACtHR considers it possible for new survivors to present themselves after the deadline it established, without elaborating on the circumstances under which such requests would be considered, IACtHR, *Case of the Afro-Descendant Communities Displaced From the Cacarica River Basin (Operation Genesis) v. Colombia*, 2013, para 310 f.;

1388 See above, D. on intake and C.III. on the principle ex iniuria ius non oritur, prohibiting an actor to profit from illegal behavior.

1389 Although the Colombian program had to be prolonged given the severe delays in its implementation, see above, ch. 2, C.IV.5.

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remain to be repaired and, if so, whether other mechanisms can discharge all the obligations provided for in this chapter.

I. Summary: A Normative Framework for Reparation in Transitional Justice

How to repair an enormous universe of survivors who suffered grave harm under the difficult circumstances of transitional justice? The international law on reparation can provide normative guidance for that arduous task. Although some departures from its routine operation are warranted, these can be explained and operationalized by applying well-established interpretation techniques.

The present approach started by creating a problem. In summary, with few exceptions, states cannot limit eligibility for reparation programs. The right to reparation arises from every human rights violation suffered by any person, as long as it caused harm. There is no reason why reparation programs should be able to depart from that rule. Therefore, such programs cannot be limited to certain rights or harms only. They cannot exclude certain persons solely on the basis that they are both survivors and perpetrators. And they cannot set arbitrary cut-off dates. Just under very narrow circumstances, which are challenging to meet in transitional justice situations, can states obtain a waiver of the right to reparation from survivors or apply domestic statutes of limitation. Consequently, reparation programs must become fully comprehensive – much more than they are to date.

Making most survivors eligible is not enough to comply with the obligation to provide reparation. Survivors have a right to access justice. They must have the realistic opportunity to obtain redress under the circumstances of the transitional situation. States must, therefore, actively attempt to make the reparation program complete by turning every survivor into a beneficiary. For that, states must conduct outreach campaigns that inform survivors of the reparation program's existence, how to enter it, and navigate the process. They must leave them sufficient time to apply and cannot turn down survivors for delayed applications when they had a good reason for the delay. States must also adjust evidentiary requirements so that survivors can meet them under the challenging circumstances in the transitional society. Lastly, states must remove other barriers to effective access to justice, inter alia, by ensuring physical accessibility and affordability of the reparation program.

And here lies the first problem: Most reparation programs use eligibility and intake as bottlenecks, through which most claims to reparation fail

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to pass. This currently dominant approach is illegal. Yet, comprehensive, complete, and full reparation inflates reparation programs up to the point at which most of a state's population might be eligible and capable of entering them. The strict stance on these two levers raises a fundamental question: How to pay for and implement reparation on that scale?

One solution could be to abandon the demanding concept of full reparation and adopt a transitional-justice-specific approach, which might allow enough flexibility to focus on less onerous measures. That is not the road the author chose to take. Not only is there no legal basis to deviate from established reparation standards. The most prominent competitor to the concept of full reparation, transformative reparation, risks treating individual claims to justice as secondary to the greater goal of societal transformation. Full reparation, therefore, remains the applicable legal standard, even though the considerations that gave birth to the transformative reparation idea can enrich the concept. With that, a demanding reparation standard meets an unforgiving requirement of total comprehensiveness and completeness. While the state has a loose obligation to raise resources for reparation and can rely to a degree on external support, these strategies cannot prevent reparation programs from becoming too large for the state to handle.[1390] Seeking synergies between reparation and the fulfillment of other obligations can ease the normative conflict. But states cannot use the strategy to strip reparation of its unique character rooted in state responsibility. It, therefore, cannot solve the normative conflict either. Reducing the financial scope of reparation in transitional justice becomes inevitable. Such a reduction can be justified when conceiving the problem as a conflict between all survivors' aggregate rights to prompt reparation and other human rights law obligations and legitimate state interests. In short, if the state fully satisfied all reparation claims, it would have to cut back on many tasks vital to realizing the human rights of all members of society and legitimate state interests. Among those tasks are maintaining and progressively expanding the health care and education system, providing security infrastructure, etc. Instead of fulfilling one position at the expense of the other, the state must strike a fair balance between the aggregate claims to reparation and competing positions, limiting them as necessary and proportionate. By considering the abstract and concrete weight of each position and the probability with which a

1390 Again, one should not underestimate, how much resources can be in play, if political will exists. On the example of Great Britain's extremely costly reparation program for slave *owners*, see above, fn. 1251 and Andrews, *The New Age of Empire*, 56 f.

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limitation materializes, one can arrive at a matrix, which indicates the relative weight each position obtains in this balancing exercise. This normative conflict approach allows the state to limit the number of resources needed for reparation as necessary to enable it to cater to other legitimate demands. Unfortunately, the normative conflict approach solves the original problem by creating a bigger one. When states limit the resources available for a truly comprehensive and complete reparation program, the benefits that program provides to each survivor must become diluted up to the point at which they cannot serve as meaningful reparation. According a special role to satisfaction can prevent that from happening. Satisfaction can be provided at a smaller cost to many survivors collectively, e.g., in the form of a public apology, because it repairs not through its material value but symbolic power. While the international law on reparation reserves satisfaction for the reparation of non-material or minor material harm, teleological considerations justify expanding its role in transitional justice. Since all reparation claims must be reduced significantly, those survivors who suffered comparably less harm will end up with claims to material reparation that are next to zero. Awarding such minimal material reparation would neither serve corrective justice nor the transitional-justice-specific aims of reparation. On the contrary, it would undermine them. It better serves the objects and purposes of reparation to repair through purely symbolic measures those survivors who could only demand minimal material reparation after balancing reduced their claim.

Coupling the normative conflict approach and the resulting balancing exercise with an enhanced role of satisfaction allows meaningful reparation to become a reality in transitional justice. The concept offers a more just alternative to treating eligibility and intake as the decisive bottlenecks. The latter differentiate between survivors on the arbitrary basis of their possibility to access justice. In contrast, the present approach differentiates between survivors based on the harm they suffered, as is inherent in the international law on reparation.

It will be beyond any ordinary justice system's ability to meet the obligations elaborated in this chapter in most transitional justice situations. As a consequence, in most transitional situations, states cannot leave reparation to ordinary courts. They must devise a special reparation mechanism, equipped to deal with the challenges of the transitional situation. At the same time, states cannot take courts out of the picture entirely. Judicial oversight is necessary to safeguard the right to reparation under complex transitional circumstances. To provide adequate supervision or redress, courts cannot treat individual cases as ordinary torts but must employ this chapter's standards. They can

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either evaluate the special mechanism a state created, orient themselves at that mechanism, or oblige the state to create one. All of this must continue until all eligible survivors received adequate reparation.

Of course, as a universal standard, the concept elaborated in this chapter must remain at a high level of abstraction. The notion of normative conflict cannot prescribe an outcome for any particular situation. In reality, reparation programs are contingent on a myriad of factors, not all of which fit neatly into a formula with six variables academics devise in the comfort of their ivory tower. Reparation programs need to be constantly adapted to a rapidly changing environment, changing needs of survivors, unforeseen challenges, shifting political realities, and many other factors. They are not balanced out once to stand the test of time for eternity. The balancing exercise provides a common language through which deviations from the standard of full reparation can be justified and criticized. It thereby allows legal scrutiny and evaluation of state action, which too often is deemed a necessary political decision without alternatives. Facing such a multi-faceted process as reparation in transitional justice, this is probably all lawyers can hope for.

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