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Reparations for Victims of Genocide: The Case for Substantive ICJ Awards

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ABSTRACT

It is clear that violations of international law are expected to result in reparations, and there is hardly a violation of international law worse than genocide. This article confirms the need to repair genocide and notes the challenges faced in awarding various types of reparations, particularly for large groups. Distinguishing current International Court of Justice (ICJ) cases on genocide from the Court's previous approach in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, it then argues that – should the merits support it – an award of substantive and not merely declaratory damages is necessary to repair these victims. Given that there is no precedent for a substantive award in *erga omnes* cases on the basis of *parens patriae*, the Court must recognize a new type of mechanism, formulated in conjunction with the United Nations, which will allow reparations to be disseminated amongst eligible victims who are not nationals of the applicant state. Only if there is substantive reparation of victims can it be claimed that the outcome will serve the interests of justice and contribute in real terms to the Convention's mission to prevent the "crime of crimes."

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Introduction

There are several avenues open to the international community to secure reparations for genocide, but perhaps the most significant is in the ICJ, which has jurisdiction as a result of Article IX of the Genocide Convention.¹ This article argues for the Court to recognize a new mechanism allowing substantive reparatory awards in genocide cases brought *erga omnes*, such as in *The Gambia v Myanmar*² and *South Africa v Israel*.³ Previous scholarship has not focused on or has discounted such a possibility, but this Article demonstrates its

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¹ *Convention on the Prevention and Punishment of the Crime of Genocide* (78 UNIS 277), adopted 9 December 1948, entered into force 12 January 1951 ("Genocide Convention").

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, <https://icj-cij.org/case/178> ("The Gambia v Myanmar").

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, <https://www.icj-cij.org/case/192> ("South Africa v Israel").

consistency with ARSIWA⁴ and with the Court's approach in the *Armed Activities case*,⁵ while distinguishing declaratory awards such as in *Bosnia v Serbia*.⁶ A new reparations mechanism is crucial to repair cases brought by third states, which are a key means of enforcing the Convention.

Reparations for genocide can be pursued in individual cases before the International Criminal Court (ICC) (where feasible), in national or international claims mechanisms, including as a result of recommendations by UN Commissions of Inquiry or Fact-Finding Missions, or in human rights cases at the national or regional level. A focus on the ICJ is however appropriate given the Court's current docket. This article is structured as follows: Section 2 provides an overview of the nature of the crime of genocide in international law, while Section 3 addresses the types of reparations appropriate for genocide and how courts manage the issue of scale when making awards. Section 4 examines genocide cases in the ICJ, including its previous jurisprudence and current contentious cases. Section 5 argues for the Court to make substantive reparations awards in those current cases, and Section 6 concludes.

The Nature of Genocide

Under the provisions of the Genocide Convention 1948, the crime of genocide comprises two constituent elements. The first is the physical element, namely the acts set out in Article II that include, in particular, killing members of the group (subparagraph (a)) and causing serious bodily or mental harm to members of the group (subparagraph (b)). The second element is the mental element, namely the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. This mental element is the essential characteristic of genocide and distinguishes it from other international crimes. A specific intent (*dolus specialis*) must be present in addition to the intent required for the individual acts in order for genocide to be established. Its aim must be the physical or biological destruction of the protected group, or a substantial part of that group. Evidence of this intent is to be sought in the state's policy, but it can also be inferred from a pattern of conduct when this intent is the only inference that can reasonably be drawn from the acts in question.⁷

Genocide is usually associated with harm to a significant number of victims – a mass atrocity.⁸ As Drumbl notes, “[a]rchetypically genocide is a collective crime”⁹ (yet paradoxically a collective element is not a legally required element of the crime).¹⁰ The ICC's

⁴ Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN General Assembly in Res. 56/83 of 12 December 2001 (“ARSIWA”).

⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement of 19 December 2005, [2005] ICJ Reports 168, General List No. 116 (“the *Armed Activities case*”).

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ 2, <https://icj-cij.org/case/91> (“*Bosnia v Serbia*”).

⁷ Paola Gaeta, “Genocide,” in *Routledge Handbook of International Criminal Law*, ed. William Schabas and Nadia Bernaz (Abingdon: Routledge, 2013), 109–20, 111–13 and 115–16.

⁸ This leaves aside the debate over whether genocide can be committed against a single individual; see for example Valerie Oosterveld, “The Context of Genocide,” in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy S. K. Lee and Hakan Friman (Ardsey, NY: Transnational Publishers, 2001), 44–45. See also *The Prosecutor v Jelisic*, ICTY Trial Chamber (14 December 1999), para. 100.

⁹ Mark Drumbl, “The Crime of Genocide,” in *Research Handbook on International Criminal Law*, ed. Bartram S. Brown (Northampton: Edward Elgar, 2011), 38.

¹⁰ Kai Ambos, *Treatise on International Criminal Law, Vol. 1 Foundations and General Part* (Oxford: Oxford Press, 2013), 17–18.

Elements of Crimes contains a contextual element – that the crimes occurred “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”¹¹ Barring particularly small groups or where a perpetrator has access to a particularly devastating weapon, this means that generally speaking genocide presumes a sizeable number of perpetrators and victims. Indeed, practically speaking, it would be difficult for the international community to recognize a genocide unless there were large numbers committing and/or suffering from it.

Genocide “is a denial of the right of existence of entire human groups,”¹² and it is this intention to destroy a group of people – a part of humanity – which makes it particularly abhorrent. As the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber put it, genocide is considered “the gravest crime,”¹³ or the “crime of crimes.”¹⁴ Although there is no specific provision in the Genocide Convention requiring a state not to commit genocide itself, in *Bosnia v Serbia* the ICJ ruled that the obligations to prevent and to punish contained in Article I, together with its status as an international crime, meant there was an obligation to not commit the acts listed in Article III.¹⁵ Article I of the Convention enumerates two (other) specific duties – first, the duty to prevent commission of the crime, and the second (assuming the duty to prevent has failed) the duty to punish the perpetrators who carried it out.¹⁶ Regarding the duty to prevent (the “negative obligation”), the ICJ has made it clear that a state’s obligations regarding the Genocide Convention are extraterritorial, in that it must act according to its “capacity to influence”¹⁷ the genocidal intent and course of action of perpetrators outside its territorial borders.¹⁸ This concept means that those who can do more are expected to do more,¹⁹ and thus the content of the duty will vary from state to state according to the amount of influence that state has with the responsible persons.²⁰ ICJ litigation on Article I shows that for reparation to be owed there must be a “sufficiently direct and certain causal nexus” between the failure to act and the damage suffered; i.e. it needs to be shown that if the respondent state had acted in accordance with its obligations the genocide would have been averted.²¹ This high bar has been sharply criticized (see Section 4).

The duty on states to prevent genocide has the status of a *jus cogens* norm²² and an *erga omnes* obligation.²³ This means that the entire international community is concerned

¹¹ Valerie Oosterveld and Charles Garraway, “The Elements of Genocide,” in Lee and Friman, *The International Criminal Court*, 47.

¹² UN General Assembly Res. 96(1).

¹³ *The Prosecutor v Jean-Paul Akayesu*, ICTR Case No. ICTR-96-4-T (Trial Judgement), para. 470.

¹⁴ *The Prosecutor v Kambanda*, ICTR TC 1 (4 September 1998), para. 16.

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgement of 26 February 2007), para. 166.

¹⁶ Marco Longobardo, “Genocide, Obligations *erga omnes*, and the Responsibility to Protect: Remarks on a Complex Convergence,” *International Journal of Human Rights* 19, no. 8 (2015): 1200.

¹⁷ *Bosnia v Serbia*, para. 430.

¹⁸ Regarding the territorial scope of the Genocide Convention, see Marko Milanovic, “Territorial Application of the Convention and State Succession,” in *The UN Genocide Convention: A Commentary*, ed. Paola Gaeta (Oxford: Oxford University Press, 2009), 473–93.

¹⁹ Longobardo, “Genocide, Obligations *erga omnes*, and the Responsibility to Protect,” 1201.

²⁰ *Bosnia v Serbia*, para. 430.

²¹ *Bosnia v Serbia*, para. 462.

²² *Case Concerning Armed Activities on the Territory of the Congo (DRC v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application), ICJ Judgement of 3 February 2006, para. 64. See also Dinah L. Shelton, *Advanced Introduction to International Human Rights Law*, 2nd ed. (Northampton: Edward Elgar, 2020), Chapter 4.3.

²³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep 15, 23.

with the prevention and suppression of genocide, making these obligations “the concern of all states” – “[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection.”²⁴ The interest of all states in each other’s compliance with the Genocide Convention raises the possibility that a state or states unrelated to a genocide may bring an action against a state within which genocide has occurred or a state involved in its commission in the interests of the international community in accordance with the Convention’s Article VIII, as discussed below.

Scale and Types of Reparations

In principle, genocide must be redressed as it is a breach of obligations under the Genocide Convention (and obligations in customary international law), which is a wrongful act. ARSIWA provides in its Article 31 that “[t]he responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act,” and Article 34 provides that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction.” Further provisions detail the nature of the restitution and compensation payable. This is consistent with the *Factory at Chorzow* decision (1928).²⁵

The Genocide Convention itself contains no provisions on reparations. This was not always the case; as Kourtis notes, the original Secretariat draft contained an explicit rule (Article XIII) obligating the responsible state to grant to “the survivors ... redress of a nature and in an amount to be determined by the United Nations”. According to the draft’s commentary, this provision was considered complementary to the penal sanctions prescribed by the Convention, incorporating the self-evident principle that the state which committed/failed to avoid the perpetration of genocide within its territory must pay.²⁶ However, the US had reservations about the lack of precision concerning the proposed rule, and later versions of the draft omitted the clause. Thus, at the time of the Convention’s adoption, the duty of redress was considered incumbent but not (yet) precisely delineated.²⁷

Although the Convention does not mention reparations, subsequent international instruments have elaborated and solidified the content of the duty.²⁸ As noted in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (“the *Basic Principles and Guidelines*”), the obligation of reparation therein is not a new duty, but is found in existing obligations of international human rights law and international humanitarian law.²⁹ As such, Schabas argues in relation to genocide that “the general obligation to provide reparation should not be seen as a

²⁴ *Barcelona Traction, Light and Power Company Limited (Second Phase, Judgement)*, ICJ Reports 1970, 32, para. 33.

²⁵ *Case Concerning the Factory at Chorzow (Germany v Poland) (Merits)*, Judgement No. 13 (1928) PCIJ Series A No. 17.

²⁶ Hired Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden: Brill Nijhoff, 2008), 102-04.

²⁷ Dimitrios A. Kourtis, “The Rohingya Genocide Case: Who Is Entitled to Claim Reparations?,” *Opinio Juris* (21 November 2019), <https://opiniojuris.org/2019/11/21/the-rohingya-genocide-case-who-is-entitled-to-claim-reparations/>.

²⁸ *Ibid.*

²⁹ Preamble to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution 60/147 (16 December 2005).

new legal concept but rather as the result of an inductive assessment of the various rules adopted within a wide range of international regimes.”³⁰

Corrective Justice

Yet the modalities of reparations in genocide cases have not been without controversy. Reservations often stem partly from the inadequate nature of reparations as a tool for justice in international law more broadly. In general, reparations have developed on the classical view informed by corrective justice, which in the Aristotelian sense is about the responsible party trying to “rectify”³¹ or “restore the prior condition of the wronged party as nearly as possible by wiping out the consequences of the wrong.”³² This understanding of reparations is thus framed as a debt owed to the victim for the wrong.³³ Moffett notes this debt model has limited utility in the case of armed conflict where there is not simply two individuals but multiple actors with differing identities and vulnerabilities.³⁴ It has further limitations in the case of mass atrocity whose social character involves more than just a mathematical calculation of damage.

Hence one might question whether corrective justice is suitable in the case of genocide. To the extent that it is feasible, restitution can be appropriate for when victims have fled their homes and businesses and left immovable assets behind. However, the process of restitution can be very lengthy as the experience of Holocaust justice attests.³⁵ Otherwise, remedying the profound loss and damage (material and psychological) that has occurred must occur via compensation, although clearly this too will never be enough to wipe out the consequences of the wrong. Further, corrective justice does little to remedy the structural factors in society that led to the genocide – this might be a history of discrimination, societal and/or political exclusion, poverty or economic disadvantage as a result of indigeneity, national origin, cultural, religious or language differences or a combination of these factors. Restoration to the *status quo ante* will merely put victims back into the situation they were in which resulted in genocide in the first place, perhaps risking it occurring again.

Despite the normative drawbacks in genocide cases, as in all cases of mass atrocity, international law requires at least corrective reparations be made for international wrongs. This is made clear in ARSIWA, the *Basic Principles and Guidelines* and other instruments. Such reparations may be of two types – individual and collective – and sometimes a reparations package has included elements of both, crafted to meet the particular circumstances of the case.

³⁰ William A. Schabas, “The Prosecution of Genocide by International and Domestic Tribunals,” in William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2009), 472. See also Theo van Boven, “Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines,” in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman, Mariana Goetz, and Alan Stephens (Leiden: Brill, 2009), 34.

³¹ Dinah L. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005), 291.

³² Margaret U. Walker, “Making Reparations Possible: Theorizing Reparative Justice,” in *Theorizing Transitional Justice*, ed. Claudio Corradetti and Nir Eisikovits (Abingdon: Routledge, 2016), 239.

³³ Debra Satz, “Countering the Wrongs of the Past: The Role of Compensation,” *Nomos* 51, no. 1 (2012): 131.

³⁴ Luke Moffett, *Reparations and War: Finding Balance in Repairing the Past* (Oxford: Oxford University Press, 2023), 20.

³⁵ J. A. Gross, “Nearly 80 Years On, the Fight for Holocaust Restitution Continues in Many Countries,” *Times of Israel* (1 November 2022), <https://www.timesofisrael.com/nearly-80-years-on-the-fight-for-holocaust-restitution-continues-in-many-countries/>.

Individual Reparations

In human rights law reparations are considered an integral part of remedying violations.³⁶ However, human rights bodies have often struggled when dealing with large victim populations. The ECOWAS Court of Community Justice has declined to award individual compensation on the ground that it would be impossible to fairly compensate large victim populations.³⁷ The ACtHR tends to award collective reparations to indigenous victim communities³⁸ in part because the harm was suffered collectively, but also due to the practical difficulties of compensating large numbers of individuals – the *Ogiek* Reparations Judgement is an example.³⁹ Yet the difficulty of assessing the claims of a large victim population has not prevented other courts from awarding reparations to individual claimants. In the 2017 *Chiragov* and *Sargsyan* cases involving claims against Armenia and Azerbaijan respectfully for the conflict in and around Nagorno-Karabakh, the ECtHR awarded an aggregated amount of €5,000 for each victim on the grounds that “some situations—especially those involving long-standing conflicts—are not, in reality, amenable to full reparation”, and this was “[p]ending a solution on the political level.”⁴⁰ In another case, it held that even if it is difficult after conflict to discern and evidence each harm for large numbers of victims given the “large number of imponderables”, an award of compensation is still appropriate for the damage suffered by the individual.⁴¹ The IACtHR has often awarded comprehensive or “holistic” reparations⁴² in reference to the scale and gravity of violations in the cases coming before it in cases involving massacres during war, but it awarded individual compensation in a 2022 case involving more than 2,000 victims,⁴³ and in a case in 2012 involving more than 1,000 victims.⁴⁴ Even so, issues of scope can easily surpass the capacity of courts (even the more experienced ones).

Clearly when dealing with large victim populations, confining reparations awards to individual payments becomes less appropriate as these do not account for the social/community aspect of the crime. An attack on the life of a community can never be made up for by only considering the individuals affected separately.⁴⁵ In such cases, courts have sometimes made individual awards and included a collective component as a reflection of the fact that the harm was suffered individually as well as communally.

³⁶ See UN Human Rights Committee General Comment 31, “The Nature of the General Legal Obligation Imposed on State Parties to the Covenant”, CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 16.

³⁷ *SERAP v Nigeria*, ECW/CCJ/JUD/18/12, 14 December 2012, paras. 114–16.

³⁸ Nelson B. Mbu and Fabrice T. Endoh, “A Commentary on the African Court on Human and Peoples’ Rights Remedial Approach in its Ruling on Reparations in *African Commission on Human and Peoples’ Rights v Kenya*,” *African Human Rights Yearbook* 7 (2023), https://scielo.org.za/scielo.php?script=sci_arttext&pid=S2663-323X2023000100017.

³⁹ *African Commission on Human and Peoples’ Rights v Kenya*, Application 006/2012, Judgement of African Court of Human and Peoples’ Rights, 23 May 2022 (“*The Ogiek Reparations Judgement*”), para. 76.

⁴⁰ *Chiragov and Ors v Armenia*, Application no.13216/05, Judgement of 12 December 2017, paras 53, 80; *Sargsyan v Azerbaijan* 40167/06, Judgement of 12 December 2017, paras 35, 57.

⁴¹ *Ahmet Özkan and Others v Turkey*, Application no.21689/93 of 6 April 2004, para. 489.

⁴² Clara Sandoval, “Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes,” *International Journal of Human Rights* 22, no. 9 (2018): 1193.

⁴³ More than 6,000 victims were alleged by the Commission; *The Case of Members and Militants of the Patriotic Union v Colombia*, IACtHR (Judgement of 27 July 2022).

⁴⁴ *The Case of the Massacres of El Mozote and Nearby Locations v El Salvador*, 2012 IACtHR (ser. C) No. 252, (Judgement of 25 October 2012).

⁴⁵ Although the genocidal killing of only a few persons may have a substantial impact on a community as well.

Collective Reparations

The award of collective reparations addresses some of the above concerns surrounding individual awards (although they are still examples of corrective justice). Collective reparations include efforts to repair shared facilities such as rebuilding or providing communal infrastructure (educational facilities, utilities, roads, housing stock etc), building rehabilitation clinics which can offer medical treatment and psychological support, providing cheap loans for start-up of new businesses etc. These reparations are aimed at the community as a whole, so many victims will benefit. In international law there is no single definition of collective reparations, although one persuasive definition is that of Friedrich Rosenfeld: “collective reparations [are] the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law.”⁴⁶ Collective reparations are perhaps a better way to deal with the problems of scale that often arise with genocide (or other mass atrocity) – not only is it logistically easier to (re)build community infrastructure to benefit the victim community as a whole, collective reparations are perhaps a better way to acknowledge the social element of the crime of genocide because it is an attempt to repair the community’s way of life. Collective reparations are appropriate for violations of collective rights, which is seen particularly in cases involving the targeting of identified communities. Moreover, when the evidence available of the targeting and suffering of individual victims varies widely, “collective reparations are a compromise between the need for large-scale reparations and the inadequate evidence available to prove the harm suffered.”⁴⁷

The IACtHR has been insistent on the need for “integral reparations” and has been a pioneer in granting collective reparations in a number of cases of mass atrocity, such as in *The Case of the Río Negro Massacres v Guatemala*⁴⁸ (440 victims) and in *The Case of the Massacres of El Mozote and Neighboring Locations v El Salvador*⁴⁹ (more than 1,000 victims).⁵⁰ It is important to recognize that collective reparations are not a product of jurisprudential creation; both the *Basic Principles and Guidelines* and the *Updated Set of Principles to Combat Impunity*⁵¹ support the idea of granting reparations to individuals or collectives. The Rome Statute provides the ICC with the possibility of awarding collective reparations when the “number of victims and the scope” make this form of reparations “more appropriate.”⁵² In addition, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were empowered to order “collective and moral” reparations.⁵³

Of course, a clear danger of collective reparations is that they will blend into the regular economic development responsibilities of government, thus making them not real reparations at all. Indeed, it may be contended that post-conflict governments would

⁴⁶ Friedrich Rosenfeld, “Collective Reparations for Victims of Armed Conflicts,” *International Review of the Red Cross* 92 (2010): 732.

⁴⁷ Diana Odier-Contreras Garduno, “Collective Reparations: Tensions and Dilemmas Between Collective Reparations and the Individual Right to Receive Reparations,” *Human Rights Research Series* 84 (2018): 326.

⁴⁸ *The Case of the Río Negro Massacres v Guatemala (Preliminary Objection, Merits, Reparations and Costs)* (Judgement of 4 September 2012), IACtHR (ser. C) No. 250.

⁴⁹ *The Case of the Massacres of El Mozote and Nearby Locations v El Salvador*.

⁵⁰ In both cases the Court also awarded individual compensation – in *Río Negro* \$15,000 per victim, and in *El Mozote* \$20,000 per victim.

⁵¹ Principle 32, ECOSOC E/CN.4/2005/102/Add.1 (8 February 2005).

⁵² Rule 98(3) of the ICC Rules of Procedure and Evidence.

⁵³ ECCC Internal Rules Rev.9 (16 January 2015), Rule 23 *quinquies*.

prefer such reparations – because large numbers benefit from the communal nature of the reparations, they are politically useful, easier to manage, and cheaper for the national budget which has often been decimated due to the conflict. In fact, in many circumstances it appears that the only difference between social and economic development programmes and collective reparations is the label given to them, especially if they are not accompanied by symbolic gestures. Apart from this danger, the very objective of reparations seems to be challenged by collective reparations as it is difficult to argue that this kind of reparations will wipe out the harm of the victims.⁵⁴ This is because a failure to repair individuals sets them up for substantial material disadvantage, and collective reparations do not allow for the recognition that some persons have suffered more than others. More broadly, the failure to acknowledge individuals' losses can be a driver for resentment and further unrest.

The decision to award individual or collective reparations, or both, is relative to the particular circumstances of the case, and is a highly nuanced assessment of a variety of factors, including the type of harm suffered, whether some individuals have suffered more than others or suffered a different type of harm, the numbers of victims, as well as the quality of the evidence of the harm suffered. In a number of cases courts have awarded collective rather than individual reparations in an attempt to deal with issues of scope, or issues relating to the quality of evidence available, making awards in the interests of equity.⁵⁵

Transformative Reparations in Transitional Justice Settings

In contrast to reparations aimed at restoring the *status quo ante*, transformative reparations can be appropriate where genocide has occurred within a society. Transformative reparations have their goal to transform the underlying situation which led to the genocide in the first place. Transformative reparations go to changing the way society relates to the victimized group, such as political reforms, changing the curriculum in schools, and projects to empower the disadvantaged community including scholarships to university or pathways to jobs in the public sector etc. As Gready puts it,

[t]ransformative reparations, working alongside complementary mechanisms within a long-term transitional justice agenda, can help to enable the transformation of groups, communities, and regions out of generational cycles of poverty, discrimination, and exclusion. Those engaged and active in such processes are thus afforded the resources and centrally positioned to (self-)empower the renegotiation of power relations that facilitated past and ongoing structural socio-economic violations.⁵⁶

These sorts of reparations are necessarily collective in nature and are arguably much more effective in seeking to erase long-term the tensions that led to violence than is repairing victims according to the traditional reparation model above.

However, it is important to note that too often practice on transitional justice has been focused more on civil and political rights such as political representation than

⁵⁴ Diana Odier-Contreras Garduno, "Defining Beneficiaries of Collective Reparations: The Experience of the IACtHR," *Amsterdam Law Forum* 4, no. 3 (2012): 48.

⁵⁵ For example, the *Ogiek Reparations Judgement*.

⁵⁶ Simeon Gready, "The Case for Transformative Reparations: In Pursuit of Structural Socio-Economic Reform in Post-Conflict Societies," *Journal of Intervention and Statebuilding* 16, no. 2 (2021): 182.

socio-economic rights (this mirrors the human rights experience where civil and political rights are seen as being more prominent and verifiable through litigation). However, it is the latter which is frequently more influential in the root causes of armed conflict, or resistance to authoritarian rule.⁵⁷ Socio-economic initiatives often require significant investment of resources at a time when there are heavy demands on the State's stretched budget, making the task of implementing truly transformative reparations in a transitional justice setting a very challenging one.

The IACtHR has experimented with transformative reparations, one occasion being in the *Plan de Sanchez Massacre v Guatemala* case where 268 victims (overwhelmingly from the Maya-Achi community) were killed.⁵⁸ The reparations ordered were for the state to provide utilities and infrastructure and to improve education services. However, the Court found that implementation of the reparations consistently fell far short of the purported goal of transformation that it called for; in compliance monitoring hearings in the years following the judgement the Court repeatedly highlighted the state's lack of progress.⁵⁹ In another example, the *González et al ("Cotton Field") v Mexico* decision noted promisingly that "when ... violations occur in a context of structural discrimination, reparations cannot simply return victims to the situation they were in before the violation took place (one of discrimination); instead, reparations should aim to transform or change the pre-existing situation."⁶⁰ Yet the Court ultimately failed to award transformative reparations to address discrimination against women in Mexican society despite embracing the concept.

Part of the disparity between what the Court orders and what eventuates in practice is no doubt because the Court has limited powers when it comes to redressing structural problems.⁶¹ Further, as a concept, an over-inclusive view of transformative justice in administrative programmes risks conflation with peacebuilding.⁶² It risks substituting for poverty-reduction and development which the government should provide anyway, thereby erasing victims' rights to redress and vindication.⁶³ It also risks confusion with long-term "political goals of structural transformation."⁶⁴ Transformative reparations

... require the Court to be willing to depart from a narrowly conceived role of administering justice in individual cases and to enter the domain of institutional reform and policy-making by requiring states to address structural shortcomings in the protection of human rights.⁶⁵

⁵⁷ Ibid., 184, 185. See also Amanda Cahill-Ripley, "Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights," *Netherlands Quarterly of Human Rights* 32, no. 2 (2012): 183–213.

⁵⁸ *Plan de Sánchez Massacre v Guatemala (Reparations and Costs)*, IACtHR (ser. C) No. 116.

⁵⁹ Elise Cossart-Daly, "Plan de Sánchez Massacre v Guatemala," *Loyola L. A. International and Comparative Law Review* 36 (2014): 1455–76.

⁶⁰ *González et al ("Cotton Field") v Mexico*, IACtHR (ser. C) No. 205 (16 November 2009), para 450. See also Ruth Rubio-Marín, "The Gender of Reparations in Transitional Societies," in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, ed. Ruth Rubio-Marín (Cambridge: Cambridge University Press, 2009), 102; Rashida Manjoo, "Report of the Special Rapporteur of Violence Against Women, its Causes and its Consequences," U.N. Doc. A/HRC/14/22 (23 April 2010), para. 85.

⁶¹ Ruth Rubio-Marín and Carla Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton-Field Judgement," *Human Rights Quarterly* 33 (2011): 1062–91.

⁶² Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social & Legal Studies* 21, no. 2 (2012): 179–80, as referenced in Moffett, *Reparations and War*.

⁶³ Moffett, *Reparations and War*, 26.

⁶⁴ Sanne Weber, "From Victims and Mothers to Citizens: Gender-Just Transformative Reparations and the Need for Public and Private Transitions," *International Journal of Transitional Justice* 12, no. 1 (2018): 90.

⁶⁵ Ruth Rubio-Marín and Carla Sandoval, "Engendering the Reparations Jurisprudence."

There is therefore tension between collectively distributed transformative reparations (response to past socio-economic injustices, with forward-looking outcomes, for victims) and development (the minimum material conditions that citizens, including victims, deserve anyway).⁶⁶ Despite these real risks however, transformative reparations can ensure programmes in affected communities which might not otherwise eventuate, thus helping to ease long-term societal, economic and political tensions.

Symbolic Reparations

Symbolic reparations can be an important element of a reparations package, recognizing (as above) that material efforts to repair a genocide will always fall short. Symbolic reparations do little to improve survivors' economic, political, or social circumstances, but research, memorialization and remembrance activities can contribute to a society-wide consciousness about the victimized community and the atrocity which helps healing and social cohesion. Symbolic reparations are most effective when combined with other sorts of reparations to meet the circumstances of victims and society in general. Again, the IACtHR has been proactive in awarding symbolic gestures (together with other forms of reparations) such as in the cases of *The Las Dos Erres Massacre v Guatemala*,⁶⁷ *The Rio Negro Massacres v Guatemala*,⁶⁸ and *The Members and Militants of the Patriotic Union v Colombia*.⁶⁹ Symbolic reparations can feature when the different levels of victimhood founding individual awards are too difficult to assess, such as in *Ongwen* when the ICC awarded a symbolic sum of 750 Euros to each victim alongside collective reparations.⁷⁰ Symbolic reparations have also been granted when there has been a dearth of resources to repair survivors in other ways – the reparations outcomes of the ECCC are examples.⁷¹

Limitations on Awards

It is important to remember that regional human rights courts are limited by the fact that their foundational treaties do not mention genocide, meaning they cannot make a finding of genocide on the merits. They have however found other ways of taking into account the nature of the crime. For example, in the *Plan de Sanchez Massacre Case* the IACtHR found that it could not address the issue of genocide *per se*,⁷² but it could take into account patterns of state-perpetuated massacres against the country's indigenous people when ruling on reparations.⁷³ It finished by ordering measures of satisfaction

⁶⁶ Simeon Gready, "The Case for Transformative Reparations," 186.

⁶⁷ *The Case of the Las Dos Erres Massacre v Guatemala* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgement of 24 November 2009, paras. 256–65.

⁶⁸ *The Case of the Rio Negro Massacres v Guatemala*, paras. 272–85.

⁶⁹ *The Case of Members and Militants of the Patriotic Union v Colombia*.

⁷⁰ *The Prosecutor v Dominic Ongwen* (Reparations Order), ICC-02/04-01/15 (28 February 2024), paras 574, 576–80, 612–34.

⁷¹ Christoph Sperfeldt, "The Extraordinary Chambers in the Courts of Cambodia," in Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Cambridge: Cambridge University Press, 2022), 205–38.

⁷² Note that Judge Cançado Trindade, in a separate judgement, stressed that the Court was permitted to take into account genocide as "aggravating circumstances" surrounding violations of the American Convention; *Plan de Sánchez Massacre v Guatemala* (Merits), Separate Opinion of Judge Antônio Augusto Cançado Trindade of 29 April 2004, IACtHR (ser. C) No. 105, para. 24.

⁷³ *Plan de Sánchez Massacre v Guatemala* (Merits), Judgement of 29 April 2004, IACtHR (ser. C) No. 10, para. 51.

and guarantees of non-repetition, compensation (pecuniary and non-pecuniary) amounting to a total of near US\$8 million, and improvements to be made within five years to local infrastructure and education to take account of the attempt to erase indigenous cultural life.⁷⁴ While the quantum was welcomed, this ruling has since attracted criticism for the lack of a range of measures to remedy the cultural vacuum the state had attempted to create,⁷⁵ suggesting that a more ambitious reparations profile, especially with regard to transformative measures, was required.

As to the quantum, many scholars such as Moffett are of the opinion that “full” reparation sets the standard

impossibly high, and risks letting such wounds fester, and further victimization and mistrust to breed. War fundamentally changes victims’ lives, making their recovery or return to the past unlikely, instead putting them on a different life path than they expected. ... [M]odesty can be more productive in envisioning what reparations can do in lightening the weight of the past on the path they now tread.⁷⁶

That is, it is suggested that full reparation is not feasible and even if it was, it is not advisable, as it does not adequately take into account other relevant factors such as proportionality and a balance of victims and responsible actors’ rights.⁷⁷ A more appropriate response is a balance of all these factors, which may comprise less than the reparation maximalists demand (these comments are equally applicable to other international crimes).

The *Basic Principles and Guidelines* speak of reparations being adequate, appropriate, and effective. In the event of mass atrocity they do not specify whether reparations should be individual or collective, transformative, or symbolic, only that they be adequate in being sufficiently addressed to the nature and seriousness of the harms suffered, appropriate in that they correspond to the needs, wishes and sensitivities of victims, and effective in that they do what they are intended to achieve.⁷⁸ This is a formula that is difficult to achieve in any case of mass atrocity, let alone one of genocide.

Reparations in the International Court of Justice (ICJ)

The ICJ does not have a lengthy history of granting reparations. Generally speaking, it is not a reparations body for individuals or collectives; it is an inter-state dispute resolution body. However, it is empowered to award reparations under Article 38(1) of its Statute, consonant with customary international law dating back to the *Factory at Chorzow* decision⁷⁹ and/or the general principles of law recognized by civilized nations.

The ICJ has awarded monetary reparations in previous (non-genocide) cases, such as *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (2012),⁸⁰

⁷⁴ *Plan de Sánchez Massacre v Guatemala*, Monitoring Compliance with Judgement, Order of the Court, “Having Seen” para 3; *Plan de Sánchez Massacre v Guatemala (Reparations and Costs)*, paras 73–117.

⁷⁵ See <https://www.ictj.org/location/guatemala>.

⁷⁶ Moffett, *Reparations and War*, 67.

⁷⁷ *Ibid.*, 57.

⁷⁸ The ILA’s 2010 Declaration of International Law Principles on Reparations for Victims of Armed Conflict have been considered *lex ferenda*, rather than a narrow construction of *lex lata*.

⁷⁹ *Factory at Chorzow (Germany v Poland)*, 47.

⁸⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation)*, Judgement, [2012] ICJ Reports, 324.

and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (2015).⁸¹ Additionally the Court grappled with a case of mass atrocity in the *Armed Activities case*; there, the Court found that Ugandan troops had unlawfully occupied Congolese territory (the Ituri region) and were responsible for killing and torturing Congolese civilians, destroying villages and civilian property, and recruiting child soldiers for combat. It also found that Ugandan troops had looted and plundered Congolese natural resources. Although the Court preferred the states involved to negotiate reparations themselves given the evidential difficulties in managing a large-scale programme many years after the abuses occurred⁸² (its 2005 judgement on the merits had provided as such),⁸³ it considered the issue of reparations following a lack of agreement between the parties. It ended up awarding USD325 million in reparations to the DRC which included USD225 million for personal injury, USD40 million for economic loss and USD60 million for damage to natural resources.⁸⁴ It did so by using “global sums” to determine reparations in each category of damage, which were decided “within the range of possibilities indicated by the evidence and taking into account equitable considerations.” The Court noted that its previous reparations jurisprudence had established that “global sums” could be used in exceptional circumstances, such as in this case where there was considerable uncertainty about the exact extent of the damage suffered.⁸⁵

Previous Genocide Decisions in the ICJ

The ICJ has grappled with genocide and reparations for genocide on two previous occasions.⁸⁶

Bosnia v Serbia (2007)

In *Bosnia v Serbia* (2007) the Court found that massive killings and other atrocities had been perpetrated throughout the territory of Bosnia and Herzegovina (which may well amount to war crimes and crimes against humanity), but these acts were not accompanied by the specific intent (*dolus specialis*) that defines the crime of genocide (namely, the intent to destroy, in whole or in part, the protected group).⁸⁷ The Court did, however, find that the VRS (Army of the Republika Srpska) killings in Srebrenica in July 1995 were committed with the *dolus specialis* to destroy in part the group of Bosnian Muslims in that area, and therefore that was indeed genocide. On that point, the Court considered that although the decisions of the VRS could not be attributed to Serbia and Montenegro under the rules of state responsibility (and thus the state had not violated its “positive” obligation), Serbia and Montenegro had violated the “negative”

⁸¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Compensation)*, Judgement, [2018] ICJ Reports, p. 15.

⁸² See the *Armed Activities Case (Reparations)*, Judgement of 9 February 2022, para 67.

⁸³ The parties were to “seek in good faith an agreed solution” based on the 2005 judgement – *Armed Activities on the Territory of the Congo (DRC v Uganda) (Merits) (Judgement of 19 December 2005)*, para. 261.

⁸⁴ This was to be paid in five annual instalments (over the period 2022 to 2026) of USD65 million each; *the Armed Activities Case*.

⁸⁵ *The Armed Activities Case*, paras 106–108.

⁸⁶ A third instance, which the Court dismissed for lack of jurisdiction, occurred in *Sudan v United Arab Emirates (Request for Provisional Measures) (Order of 5 May 2025)* – as that case did not proceed to the merits stage it is not discussed in this article.

⁸⁷ *Bosnia v Serbia*, para. 277.

obligation contained in Article I of the Convention in failing to take steps to prevent the genocide.

As for reparations, Bosnia and Herzegovina had argued that “Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment.”⁸⁸ However, the Court noted that Bosnia and Herzegovina’s arguments regarding compensation were predicated on a finding that Yugoslavia had violated Article III of the Convention. In contrast, with respect to the breach of Article I (the failure to prevent), the Court found that financial reparation was not owed due to the lack of a causal nexus between Yugoslavia’s (in)action and the damage on the ground.⁸⁹ However, the Court agreed that satisfaction was owed, and as it had held in the *Corfu Channel case*⁹⁰ and as Bosnia and Herzegovina had itself suggested, the proper form of reparation for such a breach was declaratory.⁹¹ Thus it decided that reparations would take the form of a declaration in the Operative Clause of the Judgement – that Serbia and Montenegro had failed to comply with the obligation to prevent the crime of genocide. It is curious that Bosnia and Herzegovina did not make more fulsome representations regarding the proper form of recompense for a breach of Article I, and it appears that the Court was puzzled by its procedural conduct during the hearings.⁹²

As for the obligation to punish acts of genocide, again the Court found that a declaration in the Operative Clause of the Judgement – that Serbia and Montenegro had violated its obligations under the Convention, and that it must transfer individuals accused of genocide to the International Criminal Tribunal for Yugoslavia and must co-operate fully with the Tribunal – would constitute appropriate satisfaction.⁹³

Thus on both counts the Court missed the opportunity to award meaningful redress for genocide. Gattini puts it as follows:

in the light of the exceptional gravity of the crimes under consideration, the Court could have shown more creativity and sensitivity with regard to the ‘non-material damage suffered by the surviving heirs or successors [of the victims] and their dependants’, as Bosnia had requested, even if referring to the “wrong” Article.⁹⁴

Such redress could have included rehabilitation, psycho-therapeutical treatment, various measures for honouring and keeping alive the memory of the victims,⁹⁵ and/or a range of other possibilities such as those adopted by the IACtHR.⁹⁶

Further, the failure of the Serbia and Herzegovina Government, specifically acknowledged by the Court, to do anything to halt the mass killing in and around Srebrenica should have given rise to an obligation on it to pay substantive reparation, such as

⁸⁸ *Bosnia v Serbia (Application Instituting Proceedings)*, 20 March 1993, paras. 134 and 135(r).

⁸⁹ *Bosnia v Serbia*, para. 462.

⁹⁰ *Corfu Channel Case (United Kingdom v Albania)*, ICJ Reports (1949), 4.

⁹¹ *Bosnia v Serbia*, para. 463.

⁹² Andrea Gattini, “Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgement,” *European Journal of International Law* 18 (2007): 706–7.

⁹³ *Bosnia v Serbia*, para. 471 (Operative Clause of the Judgement).

⁹⁴ Andrea Gattini, “Breach of the Obligation,” 711.

⁹⁵ *Basic Principles and Guidelines*, para. 22.

⁹⁶ See for example the *Case of the Plan de Sánchez Massacre v Guatemala (Reparations and Costs)*, where the Court ordered a suite of reparations – individual and collective.

compensate for the damage suffered by the victimized population in accordance with the famous *Factory at Chorzow* decision⁹⁷ and ARSIWA Article 36. The Court however adopted a narrow view of causation with respect to the Article I “negative” duty, asserting that it needed to find a “sufficiently direct and certain causal nexus” between the wrongful act and the injury suffered. Because the genocide would have occurred even if Serbia and Herzegovina had complied with its duty of prevention, it alleged that “financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.”⁹⁸ Making financial compensation subject to a stringent causal link in cases of omission (such as the failure to prevent) sets the bar unreasonably high, and fails to adequately appreciate the fact that Serbia and Montenegro had significant means of influencing the Bosnian Serb military and political authorities, and prior knowledge of a serious risk that genocide may occur. It had also failed to comply with ICJ interim orders requiring it to act.⁹⁹

The reparations decision in this case has received other sharp criticism too. The ruling that a declaration was to be considered the most appropriate form of satisfaction fell well short of Bosnia and Herzegovina’s submissions (above) on reparations (even if these had related mostly to Article III). Moreover, in 2007 Tomuschat argued that the Court’s finding of an equivalence between Srebrenica and the *Corfu Channel* case (where a declaration was also made by way of reparation), deserves pointed reproach as the deaths of 7,000 people cannot in any way equate to a violation of sovereignty over a coastal sea which did not entail any material damage at all.¹⁰⁰ Other commentators have also criticized the judges for not ordering broader reparations.¹⁰¹

Croatia v Serbia (2015)

In *Croatia v Serbia* (2015),¹⁰² the ICJ found that while the *actus reus* of genocide had been established, Croatia had not persuaded the Court that the *dolus specialis* (specific intent to destroy ethnic Croats or a part of that group) was present as well, because the crimes committed against ethnic Croats had the aim of forcing the displacement of the majority of the Croat population in the regions concerned, not bringing about its physical or biological destruction.¹⁰³ On the counter-claim, Serbia had also demonstrated the *actus reus* of genocide, but again had not shown that Croatia’s acts against ethnic Serbs extended beyond “ethnic cleansing.”¹⁰⁴

Again the threshold for the *dolus specialis* was very high. As Milanovic puts it, the Court’s findings were

... entirely consistent with its 2007 *Bosnian Genocide* judgement: repeatedly finding that acts that qualified as the *actus reus* of genocide were committed, but without the necessary *mens*

⁹⁷ *Factory at Chorzow* (Germany v Poland).

⁹⁸ *Bosnia v Serbia*, para. 462.

⁹⁹ *Bosnia v Serbia*, paras. 438, 453–454, 456.

¹⁰⁰ Christian Tomuschat, “Reparations in Cases of Genocide,” *Journal of International Criminal Justice* 5 (2007): 910.

¹⁰¹ For example, Conor McCarthy, “Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at The International Court of Justice,” in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman and Mariana Goetz, 2nd ed. (Leiden: Brill, 2020), 364.

¹⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgement of 3 February 2015, [2015] ICJ 3.

¹⁰³ *Ibid.*, paras 402–40.

¹⁰⁴ *Ibid.*, paras 500–15.

rea (genocidal intent), so that there was no genocide, while the Court had no jurisdiction to determine state responsibility for any other internationally wrongful act.¹⁰⁵

The Court's determination that it had jurisdiction only under Article IX of the Convention meant there was a lack of jurisdiction over anything else, even if they were violations of peremptory norms, obligations owed *erga omnes*, or even the customary international law on genocide.¹⁰⁶ This clearly impacted the outcome of the case. Further, given the fact that Serbia had been a party to the previous case of *Bosnia v Serbia* and had two preliminary orders made against it during the course of the same conflict which gave rise to this claim, it might be argued that the burden of proof should have been reversed at least for the *Croatia v Serbia* claim (Tomuschat argued the same regarding *Bosnia v Serbia*).¹⁰⁷ This might have impacted upon the Court's finding regarding the *dolus specialis*.

In the end, the finding of no genocide on either side meant the reparation stage was not reached, although Croatia had claimed Serbia's "obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment" in its initial Application.¹⁰⁸ As such, there was again no consideration of substantive reparations as redress for the finding of genocide.

As indicated above however, the Court has had some experience with granting reparations, including in a case of mass atrocity involving many victims (the *Armed Activities case*). That case certainly had shortcomings as to the calculation of the quantum of damages, with some commentators suggesting that the Court could have done more to ensure a stronger evidentiary base for the reparations it awarded.¹⁰⁹ Even so, it is submitted that the fact that it ended in an award of substantive reparations, and utilized creative means to do so, affords a precedent for subsequent cases coming before the Court.

Current ICJ Cases on Genocide

Four more cases concerning the Genocide Convention are currently before the ICJ in which it may have opportunity(ies) to award substantive reparations. In *The Gambia v Myanmar*,¹¹⁰ The Gambia has sought reparations for the alleged genocide of the Rohingya, bringing the case on the basis of obligations *erga omnes*¹¹¹ as per the *Barcelona Traction case*.¹¹² In *Ukraine v Russia*,¹¹³ Ukraine has denied genocide has taken place in Eastern Ukraine and has petitioned the Court for reparations for all acts taken on the basis of

¹⁰⁵ Marko Milanovic, "On the Entirely Predictable Outcome of Croatia v Serbia," *EJIL Talk!* (6 February 2015), <https://www.ejiltalk.org/on-the-entirely-predictable-outcome-of-croatia-v-serbia/>.

¹⁰⁶ *Ibid.*

¹⁰⁷ Tomuschat, "Reparations in Cases of Genocide," 907–908.

¹⁰⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Application Instituting Proceedings)*, 2 July 1999, para. 36.

¹⁰⁹ See for example Cecily Rose, "Evidentiary Challenges in the Litigation of War Reparations: *Armed Activities on the Territory of the Congo (DRC v Uganda)*," *Journal of International Dispute Settlement* 16, no. 1 (2025): 1.

¹¹⁰ *The Gambia v Myanmar (Application Instituting Proceedings and Request for Provisional Measures)*, 11 November 2019.

¹¹¹ This finding is consistent with the Court's ruling in *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) where it discussed the nature of the obligations under the Convention. See also *The Gambia v Myanmar (Preliminary Objections)*, Judgement of 22 July 2022, paras 107–12.

¹¹² *Barcelona Traction case*.

¹¹³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Application Instituting Proceedings)*, 26 February 2022.

Russia's false claim. In *South Africa v Israel*,¹¹⁴ South Africa has brought a claim on an *erga omnes* basis, alleging that Israel's prosecution of its war in Gaza contravened its obligations under the Convention and seeking reparations for Palestinian victims. Lastly, in *Nicaragua v Germany*,¹¹⁵ Nicaragua, again on an *erga omnes* basis, has argued Germany has breached the Convention and other international law through providing material assistance to Israel in its war in Gaza, suspending funding to UNRWA, and failing to prosecute violations of international law. It has requested full reparations for these breaches.

A New Form of Reparations for Genocide

The Case for Substantive Reparations

The nature of a finding of genocide suggests a new approach to reparations is required. In *The Gambia v Myanmar*, *South Africa v Israel* and *Nicaragua v Germany*, it is submitted that should the Applications be upheld, the Court must do more than give a declaratory remedy, as it did in *Bosnia v Serbia*. In the latter case the Court declined to order financial reparations on the basis of there being a lack of a causal nexus between the state's conduct and the genocide,¹¹⁶ but this does not apply in any of the three cases cited as there is a clear connection between the state's policy and the conduct of the genocide. Although the applicants have also invoked Article I of the Convention in their request for reparations, these cases do not involve failures to act – rather, two involve alleged *active genocidal conduct* by the state, and the other *complicity in genocidal conduct*. Thus there is a causal nexus between each state's conduct and the genocide, so the rationale behind the grant of a declaratory remedy in *Bosnia v Serbia* should be distinguished in these cases. This should make substantive reparations to victims more likely; after all, it is only right that active genocidal conduct and complicity result in weightier awards reflective of the seriousness with which they are regarded by the international community.

That said, these cases have been brought on an *erga omnes* basis. There are no arrangements to give victims standing before the ICJ and it is unclear who is entitled to raise a reparations claim on behalf of the victimized community. Relevant state practice is scant. In the *South West Africa cases* (1962), Ethiopia and Liberia, defending the right of the Namibians to self-determination, sought only declaratory relief.¹¹⁷ Citing that case, parts of ARSIWA appear to support the view that when a collective entity's right is at stake, third parties acting on its behalf can only seek declaratory relief.¹¹⁸

However, the *South West Africa cases* were decided over 60 years ago, and do not take account of the many modern advances in the law on reparations. Further, other provisions of ARSIWA support reparations for the victim community as injured parties. Article 31(1) provides that a State is under an obligation to make full reparation for the injury caused

¹¹⁴ *South Africa v Israel* (Application Instituting Proceedings), 29 December 2023.

¹¹⁵ *Case Concerning Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v Germany)* (Application Instituting Proceedings), 1 March 2024.

¹¹⁶ *Bosnia v Serbia*, para. 462.

¹¹⁷ *South West Africa cases* (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections), Judgement of 21 December 1962, 322–24, <https://www.icj-cij.org/files/case-related/47/047-19621221-JUD-01-00-EN.pdf>.

¹¹⁸ The ILC cites the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, para. 127:11.

by an internationally wrongful act, and Art 31(2) states that this injury includes *any* damage ... caused by the wrongful act; this conceivably includes damage caused to the community of victims. Further, the Commentary to the Articles provides that this obligation of reparation is “the immediate corollary of a state’s responsibility ... resulting from the breach.”¹¹⁹ As the obligation of reparation arises automatically, a state should not need to have suffered material harm or damage before it can seek reparation for a breach¹²⁰; indeed, in the current ICJ cases of alleged genocide there is no suggestion that any of the applicant states or their nationals have suffered any direct harm. For the law to hold otherwise would mean that true *erga omnes* cases could not exist before the Court.

ARSIWA’s Commentary also makes clear that, as in the case of a human rights treaty where the obligation is owed to the community of states, the beneficiaries concerned should be regarded as the individuals affected by the breach.¹²¹ It is submitted that this is the case for alleged genocide cases as well, as the obligations of the Convention are owed *erga omnes* – and in fact the ILC makes clear that individual rights may also arise outside the field of human rights.¹²² In this vein Article 33(2) should be mentioned, which specifies that the beneficiaries of an obligation may be a person or entity other than a state.

Lastly, in Article 48 the ILC notes that it may well be that there is no state which is individually injured by a breach, yet it is highly desirable that some state or states be in a position to claim reparations.¹²³ Such a claim is to be made in the interest of the beneficiaries i.e. the community of victims of the genocide. While “[t]his aspect of article 48, paragraph 2, involves a measure of progressive development, ... [it] is justified since it provides a means of protecting the community or collective interest at stake.”¹²⁴ The importance of there being a means of asserting the collective interest in the prohibition of genocide, and imposing sufficiently onerous reparations when genocide is found to have been committed, cannot be overstated.

Dealing with the Disconnect

All that said, in practice the disconnect between the state bringing the case and the victim community does make payment of reparations difficult. Although there is no precedent in the ICJ for reparations *in parens patriae* in cases brought on an *erga omnes* basis, in *The Gambia v Myanmar*, *South Africa v Israel* and *Nicaragua v Germany* the applicants have still asked for reparations in the interest of victims. In the *Armed Activities Case* the Court took note of the DRC’s undertaking regarding the formation of a fund whereby reparations paid by Uganda would be fairly and effectively distributed to DRC victims, under the supervision of organs aided by international experts and with victim and civil society participation.¹²⁵ However, it seems unlikely that the Court will award

¹¹⁹ ARSIWA, para (4) of the Commentary to Article 31, [91].

¹²⁰ ARSIWA, Para (7) of the Commentary to Article 31, [92].

¹²¹ ARSIWA, Para (3) of the Commentary to Article 33, [95].

¹²² *Ibid.* See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgement of 20 July 2012.

¹²³ Para (12) of the Commentary to Article 48, [127].

¹²⁴ *Ibid.*

¹²⁵ *The Armed Activities case*, paras 102, 408.

reparations to The Gambia, to South Africa or to Nicaragua themselves to administer on behalf of the Rohingya and the Palestinians, given that none of these are the state of nationality of the victims.

A substantive reparation award is particularly important in genocide cases because apart from there needing to be enough of an opportunity to repair the victim community, the scope and gravity of the crime highlight the need for a concrete and substantial sum. With this in mind, what is needed is a reparation order from the ICJ which goes beyond the merely declaratory and recognizes a new type of mechanism which will allow reparations to be claimed by and disseminated amongst eligible victims who will most probably not be nationals of the applicant state. Having recognized *erga omnes* jurisdiction in *The Gambia v Myanmar*, the Court needs to grapple with how this works for substantive reparations. Moreover, it should be remembered that this issue is not alien to the international community; it considered this very point in the previous draft article of the Genocide Convention (Art XIII) which required the delinquent state to pay “the survivors ... redress of a nature and in an amount to be determined by the United Nations.”¹²⁶ It is submitted that this formula is appropriate for the current situation as it internationalises reparations consistent with the *erga omnes* nature of the obligation breached.

The Court ordering reparations subject to implementation in a manner considered appropriate by the United Nations would require at least the creation of a complaints mechanism and body to manage funding and match it with eligible claims. There are several mechanisms in recent history that could act as precedent, such as the UNCC mass claims process, to which claims might be made either by individuals or by the state of nationality of the victims, and matched to monies from a fund paid by the respondent state. Although there would be no Security Council resolution to found the body in this case, it could still operate within UN auspices, giving it international status. Another model is the German Forced Labour Compensation Programme, whereby monies from the paying state are channelled into a specially-created foundation which handles the claims (see also the *Armed Activities case* model). As appropriate the claims body could also have a part dedicated to the restitution of real property, which could operate in a similar fashion to the Commission for Real Property Claims of Displaced Persons and Refugees (operated in the wake of the 1993–1995 war in Bosnia and Herzegovina), or the Housing and Property Claims Commission (operated after the 1999 war in Kosovo).¹²⁷

Kourtis argues that reliance on the ICJ to award reparations in the case of *The Gambia v Myanmar* (i.e. do more than provide declaratory relief) “requires a new radical reading of the duty to redress as itself an *erga omnes* obligation owed to the international community for the benefit of the protected group.”¹²⁸ In this way, he argues, The Gambia’s request for substantive reparations is problematic, and unlikely to eventuate.¹²⁹ No doubt he would argue similar in relation to *South Africa v Israel* and *Nicaragua v*

¹²⁶ Abtahi and Webb, *The Genocide Convention*, 102–04.

¹²⁷ Howard M. Holtzmann and Edda Kristjansdottir, “Establishing the Claims Process,” in Howard M. Holtzmann and Edda Kristjansdottir, *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford: Oxford University Press, 2007).

¹²⁸ Kourtis, “The Rohingya Genocide Case.”

¹²⁹ *Ibid.*

Germany. Yet ARSIWA is legally broad enough to accommodate the interpretation placed upon them in this research. Rather, what is required is the mechanism by which such reparations would be administered and distributed, and the recognition of such by the Court, rather than a new legal pronouncement on the entitlement of reparations in such cases.

It might be argued that the awkward fit of courts to making compensation orders in complex cases suggests that a negotiated total claim and an administrative body to manage a reparation process would be better situated to deliver redress to victims of genocide than would a court-ordered award. Such a programme can be more aligned to the harm suffered and the need for a broader range of reparation measures than a court can process. Indeed, regional human rights courts have often been more willing to accept efforts by the state to address large claims through an administrative process rather than the courts themselves working out eligibility, evidential support for claims, and appropriate measures in individual cases.¹³⁰ One example of genocide being compensated in an administrative scheme is the Yazidi Survivors Law (YSL) in Iraq.¹³¹ Another example is the PNR process in Guatemala.¹³² Even in the *Armed Activities case* the ICJ had expressed hope that the states involved would negotiate reparations between themselves. However, in the event states cannot or will not enter into negotiations in good faith, as is a distinct possibility, the Court must be prepared to make a reparations order accordingly, as it did in that case.

Whilst arguing for substantive reparations in the ICJ, it is recognized however that this is but one dimension in victims' search for justice. Particularly in a transitional justice setting (such as Myanmar), a Court award, whilst a powerful statement in itself, is not a substitute for broader measures that will assist in redressing the genocide in question. As Bracka puts it, "[w]ithout broader truth-telling, reparations, or hybrid mechanisms that engage survivors directly, ICJ cases risk being rhetorically powerful but substantively incomplete."¹³³ That is, accompanying measures of transitional justice, perhaps spearheaded by a Truth and Reconciliation Commission¹³⁴ and tailored to the national context, including rehabilitation, societal transformation, law reform, criminal prosecutions, truth-telling and symbolic gestures are crucial. These allow victims to uncover the truth about violations, share their experiences and memorialize their losses, which fosters social healing and thus helps prevent new violations.¹³⁵ Importantly, they are additional to justice delivered by the Court (for example an award in *The Gambia v*

¹³⁰ *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, Judgement of 20 November 2013, paras. 470–1.

¹³¹ See <https://c4jr.org/ysl>.

¹³² This operated over the period 2003–2023 to compensate victims of gross human rights violations during the decades-long internal armed conflict in Guatemala, although it should be noted that despite genocide being one of the conclusions of the Commission for Historical Clarification and the crime of genocide being in the Guatemalan Penal Code (Article 376), the list of crimes compensated under the law did not include genocide *per se*. See Denis Martinez and Luisa Gomez, "Reparations for Victims of the Armed Conflict in Guatemala" (August 2019), 33, <https://reparations.qub.ac.uk/assets/uploads/Guatemalan-Report-ENG-LR.pdf>.

¹³³ Jeremie Bracka, "Genocide at The Hague: A Transitional Justice Reckoning?," *Opinio Juris* (11 March 2025), <https://opiniojuris.org/2025/11/03/genocide-at-the-hague-a-transitional-justice-reckoning/>.

¹³⁴ Agata Fijalkowski, "Truth and Reconciliation Commissions," in *An Introduction to Transitional Justice*, ed. Olivera Simic, 2nd ed. (Abingdon: Routledge, 2021), 97–121. On the need for such a body, see Bernard Duhaime, "Statement by the Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Recurrence," 24 March 2025.

¹³⁵ Anja Mihr, "An Introduction to Transitional Justice," in Simic, *An Introduction to Transitional Justice*, 1–28.

Myanmar), which is vital given the limited focus of the Court process and the risks of non-compliance with its decisions.

Quantum of Damage

In all the current cases before the ICJ, the number of victims (direct and indirect) is very large and the damage is extensive. Calculation of an exact mathematical figure for damage would be heinously difficult. In many respects the situation is similar to that in the *Armed Activities* case where the claim for reparations from Uganda was hampered by the lack of evidence presented by the Congolese side, although the Court considered the extraordinary circumstances of this case that restricted the DRC's ability to produce evidence of a greater probative value.¹³⁶ In the end the Court used "global sums" for personal injury, property damage and damage to natural resources, an approach it had endorsed in its prior reparations jurisprudence. The Court chose not to specify how it reached the sub-totals for damage to persons, property, and natural resources, and instead ruled that "[t]he Court may, on an exceptional basis, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations."¹³⁷ This approach is, according to the Court, appropriate "where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury."¹³⁸ The Court was therefore prepared to adopt a flexible approach and settle on "reasonable estimates" of damage,¹³⁹ rather than requiring substantiated evidence which would have been impossible in the circumstances to produce. In coming to this point the Court invoked the practices of other international bodies, including the EECC and the ICC's DRC-related reparation jurisprudence when discussing particular compensation aspects, such as the determination of harm and types thereof, harm valuation and evidence.¹⁴⁰

A "global sum" allows the Court to "form an appreciation of the extent of damage" without the applicant having to prove specific details of every injury.¹⁴¹ In doing so the Court adopts a lower standard of proof. This takes account of the difficulties encountered by the applicant in gathering precise evidence of damage in a situation of armed conflict and/or occupation. It also takes account of uncertainties in the amount of compensation each type of injury should receive. In recognition of the uncertainties involved in a lower standard of proof, the level of compensation awarded is reduced accordingly, to a sum "within the range of possibilities indicated by the evidence."¹⁴² A "global sum" often therefore falls far short of the actual damage suffered, meaning that when reparation is distributed individuals will gain much smaller sums for the loss suffered than the damage may suggest. For example, the DRC claimed in excess of \$4t for damage to persons but was awarded just \$225 m to be distributed amongst hundreds of thousands of people (everyone killed, injured, raped, recruited as child soldiers, and displaced from

¹³⁶ *The Armed Activities Case*, para. 157.

¹³⁷ *Ibid.*, para. 106.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, paras 124, 126.

¹⁴⁰ *Ibid.*, paras 123, 158–63, 191–92, 202–05, 237, 249.

¹⁴¹ *Ibid.*, para. 114.

¹⁴² *Ibid.*, para. 126.

their homes).¹⁴³ Whilst a modest sum is far less than ideal, it is in line with Moffett's observation regarding quantum above. Clearly also, some compensation is better than none at all.

It is submitted therefore that a similar "global sum" approach may be warranted in the cases of *The Gambia v Myanmar*, *South Africa v Israel* and *Nicaragua v Germany*, as the extent of the devastation in victim communities, like in *DRC v Uganda*, is such that requiring precise documentation of loss would be unrealistic at best and patently unjust at worst. A "global sum" approach would allow compensation to be awarded based on a lower standard of proof, and would allow the Court to take a flexible approach to the determination of the extent of harm.

An alternative in dealing with uncertainty in the degree of harm (particularly for large numbers of victims) is that the Court could order the lion's share of reparations as collective reparations, similar to what the ICC pronounced in *Ongwen*.¹⁴⁴ There, the Court considered that the large number of victims eligible for the award and the practicalities of implementation (promptness, efficiency and effectiveness) meant a collective award, covering both rehabilitation and symbolic/satisfaction measures, was the most suitable. It thus awarded over 15 million Euros for rehabilitation as well as a symbolic sum of 750 Euros for each of nearly 50,000 victims.¹⁴⁵ The symbolic sum satisfied victims' desire for individual awards without the Court having to assess levels of victimhood and multifaceted harms which would have been required to award individual compensation. If the *Ongwen* model is used it is submitted that collective modes of reparation with the payment of at least a symbolic amount to individuals would be necessary to achieve justice goals.¹⁴⁶

Conclusion

There is arguably no more heinous crime against the international community than exterminating a segment of that community. This research has argued that there must be a mechanism to allow for a substantive and not merely declaratory award of reparations for violation(s) of the Genocide Convention. A substantive award would send a powerful message that the Convention has teeth and states' violation of it results in real world consequences. The signalling effect of such an award would be lasting, powerful and consonant with the gravity of the offence, which would help to prevent future genocides and thus further one of the Convention's key objectives.

Admittedly the ICJ has limited experience in reparations and in the complexity of dealing with large victim communities, but its previous caselaw and the many models found in regional human rights jurisprudence, special tribunals and the ICC could be of assistance. This research has argued that it is beyond time a mechanism to repair victims be created in cases brought *erga omnes*, with the assistance of the United Nations, and that should the merits be proven, *The Gambia v Myanmar*, *South Africa v Israel* and/or *Nicaragua v Germany* are suitable cases for the utilization of this new type

¹⁴³ *Ibid.*, para. 226.

¹⁴⁴ *The Prosecutor v Dominic Ongwen (Reparations Order)*, paras 574, 576–80, 612–34.

¹⁴⁵ *Ibid.*, para 795.

¹⁴⁶ Juan-Pablo Perez-Leon-Acevedo, "Compensation in Cases of Mass Atrocities at the International Court of Justice and the International Criminal Court," *The Law and Practice of International Courts and Tribunals* 22 (2023): 54.

of mechanism. As the global community marks the 75th anniversary of the Genocide Convention's entry into force in 2026, such a development would further underscore the seminal value of the Convention and have a real chance at making a tangible difference for victims.

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