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The design and implementation of an optimal
reparation program: How should limited resources
for material reparation be distributed across victims
of the Colombian conflict?

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The series Documentos de CERAC sought to disseminate preliminary research work on Conflict Analysis from a variety of academic methodological perspectives.

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The design and implementation of an optimal reparation program: How should limited resources for material reparation be distributed across victims of the Colombian conflict?

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May 2007

Abstract

The Justice and Peace Law includes a mechanism in accordance with which victims of the Colombian conflict can seek reparation from illegal armed groups. This paper examines the reparation of victims under the Justice and Peace Law by reference to economic, political and social considerations, and then compares such reparation to other methods by which material resources could be distributed across the victim population. The analysis concludes that reparation under the Justice and Peace Law should continue, but that additional development assistance should be provided to the broader victim population.

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I. Executive summary

The Justice and Peace Law of 2005 establishes a broad framework for the reparation of victims of the Colombian conflict that has now continued for more than 40 years. The framework provides for both the material and symbolic reparation of eligible victims.

Assuming that limited resources will be available for the material reparation of victims, this analysis compares different methods by which those resources could be distributed across the victim population. The different methods are compared by reference to economic, political and social considerations, and the results of such analysis are summarized as follows:

	Economic considerations	Political considerations	Social considerations
Justice & Peace Law	L	M	L
Civil litigation	M	M	L
Administrative compensation	M	H	M
Development assistance	H	H	M
Donor preferences	M	L	L
Strategic allocation	L	L	L

Where:

H Represents a high rating with respect to the relevant considerations.

M Represents a medium rating with respect to the relevant considerations.

L Represents a low rating with respect to the relevant considerations.

The analysis suggests that the existing mechanism for reparation under the Justice and Peace Law is not the most attractive option because of the arbitrary nature by which victims will or will not be repaired, and because, notwithstanding recent recommendations of the National Commission for Reparation and Reconciliation, only a very small proportion of the total victim population is likely to receive any material reparation.

Despite these shortcomings, the analysis suggests that victims should continue to be repaired in accordance with the Justice and Peace Law. This is because of the high political costs that would be suffered by the National Commission of Reparation and Reconciliation and the Colombian Government if the soon-to-be-implemented reparation program was discarded in favor of a different reparation program. In addition, any further delays to the proposed program or

additional restrictions would be contrary to the hopes and expectations of many victims and non-victims.

However, for victims to receive fair, viable and sustainable reparation, additional funds must be provided by the Government and/or external sources, which in turn should be used to provide development assistance to a greater number of victims. The groups of victims who should be offered such development assistance are those that would obtain the greatest benefit from such material assistance.

It is imperative that the type of development assistance to be provided to groups of victims is carefully selected. Most importantly, the development assistance must constitute goods or services which the target population would not otherwise expect to receive in the short to medium term. Basic services which victims feel that they are entitled to, independent of their victim status, are unlikely to have any significant reparative effect. This would be a waste of very limited resources and could cause increased resentment within the victim population and further conflict.

Finally, any development assistance should not be spread too thinly across the victim population and should be undertaken in a coordinated manner with different forms of symbolic reparation. Otherwise the potential reparative effect of limited material resources is wasted, and no significant contribution to the quality of life of victims will be realized.

II. Introduction

'The level of suffering caused by the ongoing violence is immeasurable ... and so it is impossible to aspire to achieve total reparation'

President Álvaro Uribe, during the inauguration ceremony of the Justice and Peace Law, 4 October 2005

Reparation following harmful conflict can be undertaken to address the current needs of victims and to reduce the likelihood of victim retaliation and further harm. The process of designing and implementing a reparation program is, however, inherently difficult, and involves complex interactions between economic, political and social factors. Achieving a balance between these factors is critical; insufficient reparation can lead to on-going social and political problems between a victim population and the rest of the society,¹ whereas too much reparation can lead to accusations that the victim population is receiving an 'unjust' allocation of limited resources and its further targeting by the non-victim population.² In addition, independent of the extent to which reparation is provided, there exists the potential for tension within the victim population as to whether such reparation should be distributed equally or vary across different victims or victim groups.³ Achieving an appropriate balance is particularly delicate in developing countries where institutional support for victims can be relatively limited and there are greater constraints on resources.

Following the introduction of the Justice and Peace Law of 2005 (*JPL*), the National Commission of Reparation and Reconciliation (*NCRR*) of Colombia is in the process of designing and implementing a program for the reparation of victims of the Colombian conflict. The broad framework for reparation set out in the *JPL*, and the extent of the harm suffered by victims during this conflict, mean that it is very unlikely that there will be sufficient material resources to repair all victims for all harm incurred.⁴ As the *JPL* currently stands, the material reparation of victims will occur on a relatively arbitrary basis, with only a very small proportion

¹ Schotsmans M., 'Victims' Expectations, Needs and Perspectives After Gross and Systematic Human Rights Violations' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), pp. 106 and 128.

² For example, see Cammack, D., 'Reparations in Malawi' in De Greiff, P., 'Repairing the Past: Compensation for Victims of Human Rights Violations', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 221, with respect to victims in Malawi, and Colvin, C. J., 'Reparations Program in South Africa' in De Greiff, P., 'Repairing the Past: Compensation for Victims of Human Rights Violations', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 189, with respect to victims in South Africa.

³ For example, see Issacharoff, S. and Morawiec Mansfield, A., 'Compensation for Victims of September 11' in De Greiff, P., 'Repairing the Past: Compensation for Victims of Human Rights Violations', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 312, with respect to victims of the September 11 attacks, and Rombouts, H. and Vandeginste, S., 'Reparation for Victims in Rwanda: Caught Between Theory and Practice' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 338, with respect to victims in Rwanda. Resentment can also occur between victims from different harm-inducing events, for example, some African Americans resented the reparation of Japanese Americans who were interned during World War II, see Yamamoto, E. K. and Ebesurawa, L., 'Report on Redress: The Japanese American Internment' in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 276.

⁴ See Richards, M., 'Quantification of the Financial Resources Required to Repair Victims of the Colombian Conflict in Accordance with the Justice and Peace Law' (December 2006) *CERAC Working Paper No. 3*.

of victims receiving any resources. This is because the provision of material reparation to particular victims is conditional on the perpetrator of the relevant harm electing to demobilize and having sufficient assets.⁵

Assuming that there will be limited resources for the material reparation of victims of the Colombian conflict, this paper analyses how such resources could be distributed across different victims. To do so, the method for distributing limited resources under the JPL is compared with alternative methods with respect to different economic, political and social considerations. The analysis is structured such that Part III provides a theoretical analysis of reparation programs, including the reasons for reparation programs and the different forms that such programs may take. Part IV then critiques the proposed Colombian reparation program, before Part V examines alternative means by which to distribute financial resources across victims given different economic, political and social considerations. Finally, Part VI provides recommendations regarding the on-going reparation of victims.

⁵ JPL, articles 10, 11, 42 and 44.

III. Theory of reparation programs

What is a reparation program?

The meaning of ‘reparation’ and the goals of legitimate reparation programs are settled neither in theory, nor in practice.⁶ Deriving from the word ‘repair’, the concept of reparation is recognized as having both judicial and political meanings. Common to each are elements of justice, dignity and restoration for victims following conflict or some other harm-inducing event. The precise meanings and practical applications of the term are, however, influenced by the particular economic, political, and social context, and the normative values of relevant stakeholders.

The established judicial definition of reparation under international law is said to include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷ This judicial approach to reparation focuses on repairing individual harm; that is, to restore the particular victim to effectively the same position in which he or she was in prior to the harmful act occurring, and to then provide compensation to the extent that it is impossible to undertake such restoration. The extent to which different reparation programs have satisfied this objective has varied, however no program for the reparation of victims of massive and systematic harm has ever done so in absolute terms.⁸

The broader and more political meaning of reparation is usually applied to situations where massive and systematic harm has occurred, where the interests of justice require more than restoring individual victims and extend to the reconstitution of the society more generally. Approaching reparation of victims as a broad political project, under which institutional and attitudinal restructuring is sought, is thought to be appropriate for two reasons.⁹ Firstly, judicial systems are established and operate on the assumption that norm-breaking behavior is exceptional. Therefore, when massive and systematic harm occurs, it is unreasonable to expect a judicial system to be capable of reproducing the same type of results that it can achieve with respect to smaller scale, or less intense, instances of harm. Secondly, acknowledging reparation as a broad political project provides increased flexibility for meeting additional economic, political and social objectives. Not surprisingly, broad, political interventions lead to tensions and compromises, and have the potential to cause additional anguish for individuals and communities that are already suffering harm.

Why is material reparation of victims important?

⁶ De Greiff, P., ‘Repairing the Past: Compensation for Victims of Human Rights Violations’, in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 13.

⁷ United Nations, ‘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’ (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005), article 18.

⁸ De Greiff, P. and Wierda, M., ‘The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints’ in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 233.

⁹ De Greiff, P., ‘Justice and Reparations’ in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 454.

The reparation of a victim population is justified on positive (descriptive) and normative terms. Reparation, or the failure to provide reparation, can have important psychological effects at both the individual and collective levels.¹⁰ At the individual level, victims can cease being happy and productive members of their community, leading to a drain on local resources, or the active infliction of further harm on other individuals or the society in general.¹¹ At the collective level, perceived injustices can remain alive in the conscience of a population for decades and across generations, with a population potentially doomed to repeatedly fight the same costly battle until it is satisfactorily resolved in that population's favor.¹² Overall, there are many instances in which not addressing the needs of victim populations has only led to more extensive and expensive reparation needing to be undertaken at a future point in time.¹³

The references to individual states of mind or perceptions implies that there can be costs associated with not satisfying actual preferences of individuals and communities, with objective interpretations as to the quality or fairness of a reparation program at times being secondary to more subjective analysis. This also means that cultural differences, levels of education and information can play an important role in the success of a reparation program.¹⁴

To many people, it is also unethical to ignore harmful acts such as gross and systematic violations of human rights, such that moral and political pressure builds for perpetrators to take

¹⁰ Sveaass, N. and Lavik, N. J., 'Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation', (2000) 69(1) *Nordic Journal of International Law* 35, p. 41.

¹¹ See, for example, Schotsmans M., 'Victims' Expectations, Needs and Perspectives After Gross and Systematic Human Rights Violations' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 106, and Sveaass, N. and Lavik, N. J., 'Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation', (2000) 69(1) *Nordic Journal of International Law* 35, p. 44. In Colombia, because it is experiencing an on-going conflict, failure to repair victims also increases the risk that such victims will be recruited by illegal armed groups to continue the conflict, see Rich, H. L., *Colombia Project - Consultation to the World Bank* (2006), p. 20.

¹² Gairdner, D., *Truth in Transition: The Role of Truth Commissions in Political Transition in Chile and El Salvador* (1999), p. 60, and Mani, R., 'Reparation as a Component of Transitional Justice' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 67. Further, ex-Senator Rafael Pardo of Colombia, in an interview in Bogotá on 12 January 2007, referred to a small association of aggrieved persons (Asociación de Damachados del Terremoto) who perceive that they were not treated fairly during the reconstruction of the city of Popayán following a 1983 earthquake. Despite the reconstruction program being considered a success, this association continues to exist and exert some political pressure within the region. These sentiments were confirmed in an interview with Senor León de Jesús, a representative of internally displaced victims within Colombia, Bogotá (16 January 2007).

¹³ See, for example, a failure to provide significant financial reparation to victims in South Africa has led to apartheid lawsuits and potentially larger amounts now being claimed: Hamber, B., 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 578. Also, removing victims' rights to domestic reparation in Argentina has led to some victims making claims to the Inter-American Court of Human Rights where significantly larger amounts were awarded than would have needed to be awarded under any domestic reparation program: Guembe, M. J., 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 29.

¹⁴ Schotsmans, M., 'Victims' Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 105.

responsibility for harm they cause to others.¹⁵ Other rationales for reparation have focused on the role of the State, including that it is the State's absolute duty to protect its citizens from crime, that the State should ensure a more equitable distribution of income through transfers to those that suffer significant harm, and that crime is the fault or responsibility of society in general and therefore the State should facilitate the reparation of those who suffer from harmful acts.¹⁶ The reparation of victims can also be justified using Rawls' theory of justice; that applying a veil of ignorance (when individuals are uncertain if they will be victims of actions beyond their control) can lead to some reparation of victims on fairness grounds.¹⁷ Bentham's utilitarian theory can also be applied; that if marginal utility from the receipt of income or any other form of reparation differs across victims and non-victims, or if non-victims gain utility from providing assistance to victims, then some form of victim reparation is likely to be required to maximize happiness.¹⁸

In practice, whatever one's rationale for reparation, economic, political and social considerations will usually require that normative judgments be made as to which victim populations are to be repaired relative to other social needs, as well as how such reparation is to occur.

In the event that reparation is to occur, at least some form of material reparation is desirable. This is because different victims have different needs, with some victims preferring restitution, compensation or some other type of material reparation, and other victims preferring symbolic reparation.¹⁹ In addition, material reparation is thought to have symbolic value of itself, representing that the perpetrator is not above the law and indirectly expressing a commitment to making amends and taking responsibility for harm caused.²⁰ Not providing any material reparation can therefore diminish the reparative effect of other efforts. Finally, purely symbolic gestures following gross and systematic abuses of human rights are unlikely to be perceived as fair or appropriate, and risk not being recognized as sufficient reparation.

What form can a reparation program take?

The design and implementation of a reparation program can involve many different and difficult decisions. This can be the case if a judicial approach to reparation is adopted, and is particularly so when reparation is undertaken as a broad political project.

Pablo De Greiff of the International Center for Transitional Justice has identified different elements of reparation programs which are discussed below.²¹ Each of these elements involves different decisions to be made which influence the exact form of a reparation program.

¹⁵ Gairdner, D., *Truth in Transition: The Role of Truth Commissions in Political Transition in Chile and El Salvador* (1999), p. 60.

¹⁶ Meiners, R. E., *Victim Compensation - Economic, Legal, and Political Aspects* (1978), p. 2.

¹⁷ Ibid, p. 2. See also Rawls, J., *A Theory of Justice* (1971), pp. 136-142.

¹⁸ See Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1789).

¹⁹ Interview with Eduardo Pizarro, Bogotá (12 January 2007). See also Rich, H. L., *Colombia Project - Consultation to the World Bank* (2006), p. 19. Note in South Africa, most victims listed financial reparation as their first priority and need: Colvin, C. J., 'Overview of the Reparations Program in South Africa', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 176.

²⁰ Petrucci, C. J., 'Research Evidence: What We Know about Apology?', *Behavioral Science and the Law* 20 (2002): 337, p. 357.

²¹ De Greiff, P., 'Repairing the Past: Compensation for Victims of Human Rights Violations', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), pp. 6-13.

i) Scope

Scope refers to the total number of actual beneficiaries of a reparation program. For example, approximately 1.5 million victims (individuals and organizations) received compensation from the United Nations Compensation Scheme for the reparation of direct losses from the 1990 Iraqi invasion of Kuwait. In contrast, less than 14,000 victims received material reparation from the Argentinean Government for grave human rights violations occurring between 1975 and 1983 during the country's military dictatorship.²²

Although a larger program in terms of victims repaired is not necessarily indicative of a more successful program, repairing a greater number of victims with limited resources will usually mean that either more resources will be required by the reparation program, or that the quality or quantity of reparation services provided to victims will be less than it could otherwise be.

A critical decision that will affect the scope of a reparation program (and other elements below) is how a 'victim' is defined. This can be based on factors including the type of violation suffered, the actual perpetrator, the date of the violation, or the type or quantity of harm suffered.

ii) Completeness

The greater the proportion of potential beneficiaries that are repaired, the more complete a reparation program. Of course, it is unlikely that any reparation program for massive and systematic harm will ever be absolutely complete.

In the same way it affects the scope of a reparation program, who constitutes a 'victim' will have a significant effect on completeness. For example, in the case of the September 11 Victim Compensation Fund, only persons who were treated by a medical practitioner within 24 hours of suffering harm, and then hospitalized as an in-patient for more than 24 hours, were able to claim for physical injuries.²³ This prevented many victims claiming compensation, including rescue workers who subsequently discovered that they had suffered harm from smoke or dust inhalation.²⁴

Another important consideration that will have a direct effect on completeness is what processes and evidentiary standards will be required in order for victims to be awarded reparation services. The more expensive or complicated the processes, or the higher the evidentiary standards, the greater the proportion of potential beneficiaries that are unlikely to be repaired.

iii) Comprehensiveness

The comprehensiveness of a reparation program describes the different types of harm that are to be repaired. Just as a person can be excluded from being a 'victim', it is also possible to limit the type of harm to which reparation applies. A common limitation with respect to

²² Van Houtte, H., Das, H. and Delmartino, B., 'The United Nations Compensation Scheme', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 378, and Guembe, M. J., 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), pp. 40-41.

²³ *September 11th Victim Compensation Fund of 2001*, Federal Register Vol. 67, No. 49, p. 11242. Note that the time period of 24 hours was extended to 72 hours in certain specified circumstances.

²⁴ 'Ground Zero Victims', *The New York Times* (2 March 2007).

comprehensiveness is to limit reparable harm to that which is a ‘direct’ result of the harmful act.²⁵ Another example of a limitation on the type of harm to be repaired occurred in Chile where its reparation program provided benefits to families of disappeared or executed persons, the exiled, persons dismissed from jobs for political reasons, and peasants who had been excluded from land reform benefits.²⁶

Subject to resource constraints, it is desirable to have both a more complete and comprehensive reparation program for reasons of program legitimacy and to reduce the potential for reparation to remain on the political and social agenda into the future.

iv) Complexity

The different types of reparation services that are available to victims, and the methods by which they are delivered, are together referred to as the complexity of a reparation program. Generally speaking, the more complex a reparation program, the more flexible that program is and the more likely that individual victim preferences will be satisfied.

Different reparation benefits that have been used to repair victims are often distinguished as being either material or symbolic. Material reparation can include the provision of money, property, and services relating to housing, education and health. Symbolic reparation can include public apologies, the renaming of streets and facilities, the construction of public memorials and national remembrance days.

Effective reparation requires a mix of both material and symbolic benefits. This is because material reparation alone is often perceived by victims as nothing more than a measure to ‘buy’ their silence or acquiescence. For example, whether or not to accept material reparation incited intense feelings and divided the ‘Mothers of the Disappeared’ in Argentina.²⁷ On the other hand, providing symbolic reparation without any form of material sacrifice is considered too easy for perpetrators and lacking in sincerity. Whereas material resources did not form an important component of victims’ initial request for reparation in post-Apartheid South Africa, the failure to provide victims with any material resources has since led to them becoming a central demand of victims.²⁸

Also relevant to complexity is that the reparative effect of a reparation program can vary according to the connection between the perpetrator and the benefits received by individual victims, with direct reparation by one’s own perpetrator having a more significant effect than if a

²⁵ See, for example, Mani, R., ‘Reparation as a Component of Transitional Justice’ in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 68.

²⁶ Lira, E., ‘The Reparations Policy for Human Rights Violations in Chile’, in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 56.

²⁷ Guembe, M. J., ‘Economic Reparations for Grave Human Rights Violations: The Argentinean Experience’, in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 25.

²⁸ Hamber, B., ‘The Dilemmas of Reparations: In Search of a Process-Driven Approach’ in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 146.

different party provides the same reparation.²⁹ This further suggests that the value of material reparation goes beyond the intrinsic value of the actual material resources provided.

v) *Coherence*

The relationship between the different types of reparation benefits provided to victims is described as the coherence of a reparation program. More particularly, an internally coherent program is such that the different types of reparation benefits complement one another. Similarly, an externally coherent program requires that the design and implementation of reparation benefits be consistent with other efforts or benefits for victims, including truth telling programs or access to general criminal justice mechanisms.

vi) *Finality*

A further element of a reparation program is the extent to which it represents the end of the reparation process for victims. Although the demand for reparation may continue until victims consider that they have been accorded justice, the finality of the reparation process is also affected by whether other avenues of civil redress remain open to victims.

In designing a reparation program, it therefore becomes important to consider the potentially destabilizing effect and inefficiency associated with having victims continue to seek more or other forms of reparation. However, this risk must be weighed up against the benefits (and potential costs) that could result from providing more comprehensive reparation to particular victims, as well as the negative consequences of not affording the same rights to victims as compared to other persons within that society who suffer similar harm.

vii) *Munificence*

The final element to consider in designing and implementing a reparation program is the munificence or magnitude of reparation provided to victims. This has varied greatly across different reparation programs, from an average payout of \$US1.85 million for victims of September 11,³⁰ to \$US20,000 (of 1988) to each Japanese American interned during World War II,³¹ to a commitment to pay approximately \$US3,750 for South African victims of gross human rights abuses.³² Notwithstanding some very significant payments, the very nature of certain types of harm (such as physical and psychological injuries, and the loss of family members) remains inherently difficult to restore or compensate in any material and meaningful way.

²⁹ Schotsmans, M., 'Victims' Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 115.

³⁰ Issacharoff, S. and Morawiec Mansfield, A., 'Compensation for the Victims of September 11', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 285.

³¹ Yamamoto E. K. and Ebesugawa, L., 'Report on Redress: The Japanese American Internment', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 266.

³² Colvin, C. J., 'Overview of the Reparations Program in South Africa', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 176.

Importantly, the value to victims of material reparation (together with symbolic reparation) can be affected by the manner in which it is provided.³³ For example, significant delays or apparent insincerity on the part of perpetrators can jeopardize a reparation program.

The munificence of a reparation program is also related to who contributes to the reparation of victims. In the event that harm caused by perpetrators exceeds the benefits of the harmful conduct, then a more munificent reparation program will require greater contributions from other sources. For example, contributions could be sought from the non-conflict related resources of perpetrators who benefited from engaging in harmful conduct, from perpetrators who did not benefit from engaging in the harmful conduct, from non-perpetrators who did benefit from the harmful conduct of others, and from non-perpetrators who did not benefit from the harmful conduct of others (i.e. international donors). Which groups will ultimately contribute to the reparation of victims will depend on retrospective and prospective analysis of different material and moral considerations.

Finally, as with scope, munificence of itself is not indicative of the success or failure of a reparation program.

Overall, the decisions that need to be made in the design and implementation of reparation programs, and the economic, political and social tensions that need to be managed, can be affected by normative values and are inherently context specific. However, notwithstanding the complex interactions between different economic, political and social interests, it is important that a reparation program be designed and implemented so as to be objectively (and as subjectively as possible) 'fair, viable and sustainable'.³⁴

³³ Hamber, B., 'The Dilemmas of Reparations: In Search of a Process-Driven Approach' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 141.

³⁴ World Bank, *Peace Programmatic II: Reparation and Reconciliation in Colombia* (2006), p. 1.

IV. Reparation of Colombian victims

Current conflict

The design and implementation of a reparation program, as discussed above, is relevant for the victims of conflict in Colombia.

The current conflict in Colombia originated as a military struggle between the State and the Revolutionary Armed Forces of Colombia (*FARC*), the National Liberation Army (*ELN*) and other guerrilla groups. While most of these guerrilla groups were established with political and socio-economic ideals, they now engage in little more than violent terror and drug trafficking.³⁵ In response to threats posed by such guerrilla groups, paramilitary organizations formed throughout the country. These organizations have also engaged in violence against the civilian population and other illegal activities.³⁶

The effect of this 40-plus year conflict on Colombia and its civilian population has been immense. Citizens in particular regions, or of certain socioeconomic or ideological positions, have routinely faced the risk of massacre, assassination, torture and kidnapping. Millions of civilians have been forcibly displaced from their homes and lands.³⁷ Attacks on energy and other public infrastructure have also been common.³⁸

In May 2002, Álvaro Uribe was elected president of Colombia and has since launched the largest military offensive in Colombian history, primarily against the guerilla groups.³⁹ In conjunction with this offensive, both collective and individual demobilization and reinsertion programs were established which provide members of guerrilla groups and paramilitary organizations (together constituting *illegal armed groups*) with an opportunity to withdraw from the conflict. The JPL provides one such demobilization and reinsertion program, with members of illegal armed groups who fear prosecution for grave crimes able to elect to demobilize under the JPL and, if successfully prosecuted, receive reduced sentences of between five to eight years.⁴⁰ Such reduced sentences are only available, however, if the relevant member fully confesses those crimes which he or she has committed, pledges to abstain from further illegal activities, and provides his or her illegally obtained assets for the reparation of victims.⁴¹

³⁵ International Crisis Group, 'Colombia's Elusive Quest for Peace' *Latin America Report N°1* (26 March 2002), p. 3.

³⁶ *Ibid*, p. 4.

³⁷ Acción Social, 'Acumulado Hogares y Personas Incluidos por Departamentos como Receptor y Expulsor hasta el 3 de Febero del 2007', (1 March 2007).

³⁸ Rojas, C., 'In the Midst of War: Women's Contributions to Peace in Colombia' (2004), p. 8, and International Crisis Group, 'Colombia's Elusive Quest for Peace' *Latin America Report N°1* (26 March 2002), p. 18.

³⁹ Restrepo, J. and Spagat, M., 'The Colombian Conflict: Uribe's First 17 Months', *CEPR Discussion Paper 4570* (2004), p. 2.

⁴⁰ JPL, article 29, and International Crisis Group, 'Colombia: Towards Peace and Justice' *Latin America Report N°16* (14 March 2006), p. 8.

⁴¹ JPL, articles 11 and 17.

Reparation under the Justice and Peace Law

In addition to governing demobilization and reinsertion processes, the JPL provides that victims have the right to reparation.⁴²

Who is a victim?

A victim is defined broadly under the JPL as a person who has individually or collectively suffered direct harm as a consequence of actions by illegal armed groups in violation of the criminal law.⁴³

The JPL provides examples of different types of harm that could lead to a person being a victim. These include temporary or permanent injuries that cause some type of physical, psychological or sensory disability, emotional suffering, financial loss, or the infringement of fundamental rights.

The JPL also recognizes that the definition of victim can include spouses and other relatives. The Constitutional Court has interpreted this provision to include relatives beyond the first degree of consanguinity or first civil that have suffered the requisite harm.⁴⁴

The status of victim is acquired independently of whether the perpetrator of the criminal conduct has been identified, apprehended, prosecuted, or convicted, and without consideration of any family relationship between the perpetrator and the victim.⁴⁵

Right to reparation

A victim's right to reparation is consistent with the judicial approach, with reparation including actions taken for restitution, indemnification, rehabilitation, satisfaction, and guarantees of non-repetition.⁴⁶ These elements of reparation are then defined as follows:

- *Restitution* is actions that seek to return the victim to his or her situation prior to a crime.
- *Indemnification* is compensation for the damage caused by a criminal act.
- *Rehabilitation* is actions aimed at the recovery of victims who suffer physical and psychological traumas as a result of a crime.
- *Satisfaction* is actions aimed at reestablishing the dignity of the victim and disseminating the truth about something which happened.
- *Guarantees of non-repetition* include demobilizing and dismantling illegal armed groups.

Although a judicial approach to reparation is clearly adopted, the JPL does not provide any details as to how the various components should be weighed against one another or prioritized in the event of there being limited resources available for reparation. The NCCR has only recently released criteria to assist the Superior Judicial District Court in the application of the JPL provisions.⁴⁷ These criteria emphasize that reparation is to be proportional to harm suffered and

⁴² JPL, articles 1, 4 and 8.

⁴³ JPL, article 5.

⁴⁴ Constitutional Court of Colombia, Sentence No. C-370/2006 (18 May 2006), paras. 6.2.4.2.15 - 6.2.4.2.16.

⁴⁵ JPL, article 5.

⁴⁶ JPL, article 8.

⁴⁷ National Commission for Reparation and Reconciliation, *Recomendación de Criterios de Reparación y de Proporcionalidad Restaurativa* (2007).

that restitution of victims is the ideal form of reparation where possible.⁴⁸ It is noted, however, that the criteria are not binding.⁴⁹

In addition to the provisions referred to above, the JPL also refers to both symbolic and collective reparation that is to be set by judicial authorities.⁵⁰ The wording of the JPL appears to indicate that this is separate and in addition to individual reparation owing to victims.

Limits to the right to reparation

There are two principal limitations with respect to the reparation of victims under the JPL. They are:

- the perpetrator (or the illegal armed group to which he or she belongs) responsible for the (direct) harm suffered by a particular victim must elect to demobilize under the JPL; and
- the perpetrator (or illegal armed group to which he or she belongs) must have sufficient illegally obtained assets to meet that victim's claim, and other victims' claims to the same assets.

First, although the definition of victim and the right of victims to reparation is not explicitly conditional on any particular person or group having demobilized, the JPL provides that it is the members of illegal armed groups who benefit from the JPL's alternative sentence provisions who owe the duty to make reparation to their particular victims.⁵¹

Second, if the relevant perpetrator or illegal armed group does not have sufficient illegally obtained assets to repair the victim, there is no automatic recourse to any other individual or organization. Although it has been argued that the Colombian Government is at least partly responsible for much of the harm suffered during the conflict, the extent of any such responsibility remains unclear and the Government has expressly rejected that it is obliged to make up any such shortfall.⁵² However, even if there is no general liability, the failure of the State to provide a mechanism to repair victims of human rights violations for which it is responsible (through action or omission) can trigger the jurisdiction of the Inter-American Court of Human Rights. Some such cases against the State have led to very significant damages being awarded to victims who could not satisfy their claims with domestic remedies.⁵³

⁴⁸ Ibid, pp. 25 and 80.

⁴⁹ “‘Debemos Pensar en un Impuesto para Reparar’ Dice Ana Teresa Bernal”, *El Tiempo* (20 May 2007).

⁵⁰ JPL, article 8.

⁵¹ JPL, article 42. Note, even if a particular perpetrator cannot be identified, a victim could still be repaired if a causal nexus can be established between the harm and a demobilizing individual or illegal armed group.

⁵² “‘Debemos Pensar en un Impuesto para Reparar’ Dice Ana Teresa Bernal” *El Tiempo* (20 May 2007), International Crisis Group, ‘Colombia: Towards Peace and Justice’ *Latin America Report N°16* (14 March 2006), p. 12, and Holguín Sardi, C., ‘Comisión de Seguimiento de Justicia y Paz Trabaja para Brindar a las Víctimas Todas las Garantías para que no Hayan Abusos y Se Generen Situaciones que Desnaturalicen el Proceso’ *Boletín de Prensa del Ministerio del Interior y Justicia* (20 December 2006).

⁵³ For example, see Inter-American Court of Human Rights decision *Mapiripán Massacre v. Colombia* (15 September 2005) where nearly \$US4 million in damages was awarded across 35 victims.

Cost of harm suffered by Colombian victims

Examining the different types of victims in Colombia, and the harm suffered by each type of victim, and extrapolating that data across the duration of the conflict, enables the direct harm suffered as a result of the actions of illegal armed groups to be estimated.

A conservative estimate is that reparation of all victims for harm suffered between 1964 and 2005 could cost illegal armed groups \$55,544,152 million pesos (\$US23,000 million).⁵⁴ This represents approximately 19% of the gross domestic product of Colombia of 2005. The table below demonstrates how significant this amount is relative to other economic indicators and budgeted expenditures of the Colombian Government. Given that the fiscal situation of the Colombian Government is tenuous,⁵⁵ it would be almost impossible for it to implement a reparation program that is complete and comprehensive.

Expenditure to repair Colombian victims relative to economic indicators and budget items

Indicator or item (2005)	Amount (million pesos)⁵⁶	Total reparation (as a percentage of indicator or item)⁵⁷
Gross national income	271,026,000	20%
Total (budgeted) government expenditure	43,056,554	125%
Democratic Security Policy expenditure	10,118,000	533%
Expenditure on social programs under the Democratic Security Policy	946,000	5,699%
Education expenditure	8,564,000	630%
Health expenditure	3,587,000	1,503%
Expenditure on demobilized persons	441,000	12,226%
Expenditure on infrastructure programs	1,717,000	3,140%
Expenditure on agricultural programs	368,000	14,651%

The estimated loss or harm can also be allocated between guerrilla groups and paramilitary organizations according to their relative responsibility. Guerrilla groups could be responsible for

⁵⁴ Richards, M., 'Quantification of the Financial Resources Required to Repair Victims of the Colombian Conflict in Accordance with the Justice and Peace Law' (December 2006) *CERAC Working Paper No. 3*, p. 3. Note that more than half of this estimate is attributable to the loss of quality of life suffered by victims. If loss of quality of life is not included, the estimated harm suffered by victims is \$19,341,949 million pesos (\$US8,200 million), or 7% of Colombian GDP of 2005.

⁵⁵ Challa, K., 'Enabling Sustainable Growth' in Giugale, M., Lafourcade, O. and Luff, C., et al (eds), *Colombia: The Economic Foundation of Peace* (2003), 61. See also El Dahshan, M., Richards, M. and Tashu, M., *Colombia: Assessing the Macroeconomic Stance, Fiscal Conditions and Volatility* (2006), p. 10.

⁵⁶ Data sources include the World Bank's World Development Indicators database, Ministerio de Hacienda y Crédito Público, *Budget 2002 – 2007* (2006), and the *Law of the General Budget of the Nation 2005* (Ley del Presupuesto General de la Nación of 2005).

⁵⁷ The figure of \$55,544,152 million pesos is calculated as at 30 June 2006. This figure was adjusted for 3.02% inflation for the first six months of 2006 before calculating the cost of total reparation as a percentage of the indicators or items of 2005.

\$36,307,264 million pesos (\$US15,460 million and 12% of Colombian GDP of 2005), whereas paramilitary organizations could be responsible for \$19,236,888 million pesos (\$US8,191 million and 7% of Colombian GDP of 2005).⁵⁸

Is the JPL mechanism for providing material reparation fair, viable and sustainable?

Despite all victims having the right to reparation, the obligation to repair victims is conditional on the responsible perpetrator or illegal armed group electing to demobilize, and the individual or group having sufficient assets to satisfy relevant claims.

These barriers to obtaining reparation are significant because guerrilla groups such as the FARC have rejected negotiations to demobilize under the JPL.⁵⁹ Further, paramilitary organizations that have expressed an intention to demobilize have stated that they will not have sufficient assets to meet all claims.⁶⁰

In response to the potential shortfall in resources available for material reparation, there have been claims that the Colombian Government or the international community should undertake to meet any such shortfall.⁶¹ However, in addition to concerns that reparation by third parties and not perpetrators has limited reparative effect, it appears unlikely that the Colombian Government or the international community will fund any shortfall; the Minister of the Interior and Justice has recently indicated that the State will not be contributing to the individual reparation of victims unless the State is found to be clearly responsible for the harm suffered,⁶² President Uribe has rejected calls for a special tax to fund reparation efforts,⁶³ and the international community has repeatedly failed to make significant contributions to reparation funds.⁶⁴

It is therefore very probable that insufficient assets will be available for the reparation of victims relative to amounts that could be claimed.

⁵⁸ Richards, M., 'Quantification of the Financial Resources Required to Repair Victims of the Colombian Conflict in Accordance with the Justice and Peace Law' (December 2006) *CERAC Working Paper No. 3*, p. 3.

⁵⁹ International Crisis Group, 'Colombia: Towards Peace and Justice' *Latin America Report N°16* (14 March 2006), p. 3.

⁶⁰ 'No Hay Plata Para 3 Millones de Víctimas, Reconocen Ex Paramilitares Desmovilizados', *El Tiempo* (17 July 2006). See also "'Debemos Pensar en un Impuesto para Reparar" Dice Ana Teresa Bernal' *El Tiempo* (20 May 2007).

⁶¹ A recent study of Colombians showed that 33% of respondents thought that the reparation of victims should occur using international assistance, and that 30% of respondents thought that reparation of victims should occur using resources of the Colombian State, see International Center for Transitional Justice, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación* (December 2006), p. 51.

⁶² Holguín Sardi, C., 'Comisión de Seguimiento de Justicia y Paz Trabaja para Brindar a las Víctimas Todas las Garantías para que no Hayan Abusos y Se Generen Situaciones que Desnaturalicen el Proceso' *Boletín de Prensa del Ministerio del Interior y Justicia* (20 December 2006).

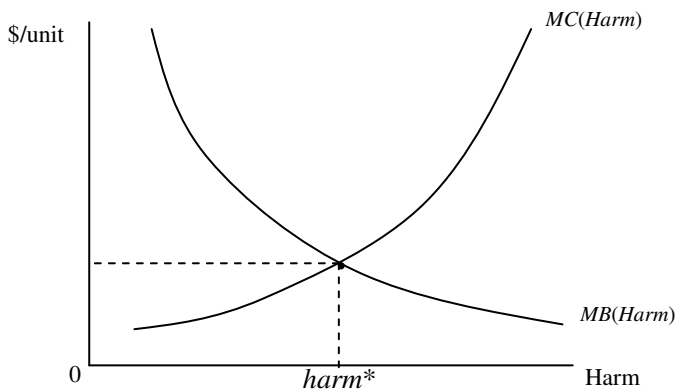
⁶³ 'Gobierno Descarta Impuesto para Financiar la Reparación de las Víctimas de los Paramilitares' *El Tiempo* (30 January 2007).

⁶⁴ Examples where the international community has not funded different reparation programs include El Salvador: Margaret Popkin, *Peace Without Justice* (2000), p. 134, the International Criminal Court Fund: Schotsmans, M., 'Victims' Expectations, Needs and Perspectives After Gross and Systematic Human Rights Violations' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 110, and the United Nations Fund for Victims of Torture: Falk, R., 'Reparations, International Law, and Global Justice: A New Frontier' in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 498.

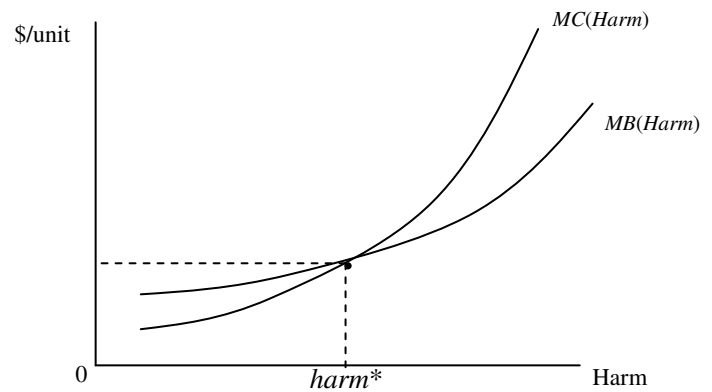
Given limited material resources and the delicate nature of reparation programs, a number of economic, political and social considerations are relevant in determining how the available resources will be distributed among the victim population, which in turn will affect whether the reparation of victims will be fair, viable and sustainable. In the following analysis, the distribution of resources under the JPL and alternative methods are examined with respect to these economic, political and social considerations.

The economic considerations that are examined are efficiency and capacity. With respect to efficiency, the reparation of victims can be used as an economic instrument to deter the socially inefficient behavior of illegal armed groups and maximize total utility.⁶⁵ This is demonstrated using the graphs below which show the marginal benefit to illegal armed groups of inflicting harm (for example, increased power, the furthering of political objectives, etc) and the marginal cost to society of that harm (for example, both physical and psychological harm to individuals and society more generally).⁶⁶ These graphs assume an increasing marginal cost to society and either a decreasing marginal benefit to illegal armed groups (graph 1) or an increasing marginal benefit at a rate less than that of the marginal cost to society (graph 2). Although it is difficult to generalize about individuals' and communities' utility functions in the context of a violent conflict, these assumptions do not appear unreasonable in the context of Colombia,⁶⁷ particularly if the frame of reference is the middle of the conflict, and not the very first or final instances of harm.

Graph 1 – Downward sloping MB curve



Graph 2 – Upward sloping MB curve



⁶⁵ Cole, D. H. and Grossman, P. G., *Principles of Law and Economics* (2005), p. 212.

⁶⁶ In this instance, harm could capture both quantity of harm and severity of harm.

⁶⁷ First, the marginal cost to society of illegal armed groups causing harm is assumed to increase with each additional unit of harm. This is because as units of harm increase, the probability of different geographic or other sectors in society being affected also increases, so the marginal effect increases from just individual or local effects to more society-wide effects. Second, the marginal benefit to illegal armed groups could decrease with each additional unit of harm because the additional unit of harm as a proportion of the total harm decreases as the units of harm increase. Alternatively, illegal armed groups could gain more benefit from causing more harm rather than less harm, but at a lower rate than the marginal cost to society. This is because illegal armed groups are small relative to the population of potential victims, so it is assumed that benefits of all levels of harm are fully enjoyed across relevant illegal armed groups, whereas the effect of harm on society is likely to continue to increase as harm becomes more widespread and society as a whole starts to break down.

If illegal armed groups do not expect to have to provide reparation to victims, illegal armed groups will continue to inflict harm until the marginal benefit curve crosses the x-axis, i.e. at the point where there is zero marginal benefit to illegal armed groups of inflicting further harm. If marginal benefit from inflicting harm is increasing, this point may not be reached until illegal armed groups' objectives are satisfied or they are no longer capable of causing harm.

If, however, the marginal cost to society of illegal armed groups inflicting harm is able to be incorporated into the decision-making of illegal armed groups, for example, if illegal armed groups expect to have to repair victims at some future point in time, then illegal armed groups who are acting rationally should only inflict harm up to the point where the marginal benefit of inflicting harm is equal to (the present value of) the marginal cost of that harm (i.e. illegal armed groups will be deterred from inflicting harm above the efficient level *harm**).

This analysis may be appropriate where there is rational behavior, perfect information, expectations that complete and comprehensive reparation will occur, and sufficient assets to cover all claims. It is less applicable, however, to conflict situations where parties' objectives can be to cause as much harm as possible (for example, the marginal benefit curve may actually lie above the marginal cost curve for increasing levels of harm), the exact consequences of harmful conduct can be impossible to know in advance (for example, the JPL was enacted after the conflict had commenced), and it is very difficult to incorporate the social cost of illegal armed groups' actions into their decision-making (for example, harm may be difficult to quantify or attribute to particular illegal armed groups, or recourse to assets may be limited, i.e. 'judgment-proof'). For these reasons, the most efficient outcome is usually for the perpetrator, as the lowest cost avoider, to be responsible (to the greatest extent possible) for all harm caused.⁶⁸

Rather than focusing on deterrence, reparation can also be viewed as an economic instrument for the prospective compensation of victims. Given insufficient material resources to meet victims' demand for resources, efficiency would instead be measured by the extent to which each additional unit of material resources is supplied to the victims who receive the highest marginal utility from the additional resources. This approach emphasizes zero waste in the provision of material reparation, with the most efficient distribution of resources being that which maximizes the total utility of the victim population. Expressed in mathematical terms, an efficient distribution would satisfy the following condition:⁶⁹

$$MB_{victim_1} = MB_{victim_2} = MB_{victim_3} \dots = MB_{victim_N}$$

This approach does not, however, distinguish between the cost of different methods of reparation, and must, therefore, be complemented by an examination of relative transaction costs and whether the Colombian State has the economic capacity to implement the different methods.

In addition to economic considerations, political considerations are analyzed by reference to the likely effect of a reparation program on the interests of different (legal) stakeholders. The analysis assumes that stakeholders are rational and seek to maximize their individual utility. It does not assume that victims receive utility from the reparation of victims other than themselves. A particular focus of the analysis of political considerations is the likely reaction of the victim

⁶⁸ Cole, D. H. and Grossman, P. G., *Principles of Law and Economics* (2005), p. 209.

⁶⁹ This analysis assumes marginal diminishing returns to material reparation.

and non-victim populations towards the Government of Colombia which is likely to be perceived as being ultimately responsible for the success or failure of any victim reparation program.

The social considerations that are examined focus on the physical and psychological needs of the victim population and the extent to which these needs will be satisfied. The analysis of social considerations, as well as political considerations, acknowledges that there will be different interpretations of concepts such as ‘fairness’, for example, with respect to the allocation of resources within the victim population and between the victim and non-victim populations.

As has already been referred to above, perceptions do matter. Political consequences will be based largely on the gap between expected and actual results, irrespective of whether or not those expectations are reasonable. Perceptions may also matter in a social sense, with victims’ psychological well-being not independent of their own subjective interpretation of events.

Finally, the distinction between economic, political and social considerations is not always clear.

Economic considerations

The method by which the JPL seeks to allocate limited material resources across different victims is to first disqualify victims whose perpetrator has not elected to demobilize or who cannot satisfy other substantive or procedural rules. The Superior Judicial District Court will most likely then allocate resources between eligible victims according to the relative quantity of loss incurred, that is, relevant losses will be totaled and available resources distributed on some form of pro rata basis.

This method of distributing available resources across victims is therefore arbitrary and inefficient in that eligibility for material reparation is not based on marginal utility derived by different victims. Whether or not a particular victim is awarded any reparation will instead depend on factors largely outside his or her control (that is, whether the relevant perpetrator elects to demobilize, whether substantive and procedural tests can be satisfied, and whether the perpetrator has sufficient illegally obtained assets).

Similarly, any allocation of material resources by relative quantity of loss does not necessarily reflect marginal utility derived from receiving resources, and is therefore inefficient. For example, quantity of loss ignores the extent of that loss relative to total income or total assets, and the different value each victim places on material versus symbolic reparation.

Reparation under the JPL is expressed broadly enough to include compensation for pain and suffering.⁷⁰ This can compromise efficiency because, although forming part of individual harm, the compensation of such non-pecuniary losses tends not to provide utility to recipients. This is evidenced by studies that show minimal demand for insurance for the death of a child.⁷¹ To provide material resources to victims for pain and suffering would therefore appear to be satisfying perceived rather than actual needs.

⁷⁰ JPL, article 5.

⁷¹ Congressional Budget Office of the Congress of the United States, *The Economics of U.S. Tort Liability: A Primer* (2003), p. 14.

Another economic concern is that the processing of individual claims could involve significant transaction costs in the form of delays, legal fees, further pain and suffering from having to recount personal experiences, and satisfying other substantive and procedural requirements. For example, although the reparation process will be somewhat streamlined by the involvement of the NCCR, each individual victim will still have to prove that they are a victim of a harmful act, that the harmful act was undertaken by the relevant perpetrator, and the quantity of harm suffered. These costs will be borne by applicants who are successful, as well as those who are ultimately found to be ineligible or for whom there are insufficient assets to make reparation.

In addition, although there is no obligation to make available more resources than are received from illegal armed groups, there remain constraints on the capacity of the system. Although much of the institutional infrastructure is now in place, including the NCCR, various regional NCCR offices, and the existing judicial system, there remain doubts as to whether this infrastructure will facilitate prompt and effective reparation. For example, the JPL charges the NCCR with substantial duties including guaranteeing victim participation in the reparation process, carrying out national acts of reconciliation, producing a study on illegal armed groups, monitoring processes of reparation and reinsertion, and providing biannual reports on the reparation process to the Government and Legislature.⁷² Further, the first 17 (of an expected 2,695) requests for claimants led to more than 25,000 victims coming forward with approximately 100,000 claims.⁷³ It will therefore be very difficult for the NCCR to meet all its obligations and facilitate fair, viable and sustainable reparation to victims.

On a more positive note, the provision of material reparation (in the form of money, rather than services) enables victims to allocate those resources according to their individual preferences.

Further, providing a mechanism for victims to seek reparation could limit the Inter-American Court of Human Rights from exercising jurisdiction over claims against the Colombian State. There are approximately 120 cases against the Colombian State awaiting trial,⁷⁴ with some victims likely to be awarded very significant damages. If these claims can instead be satisfactorily addressed under the JPL reparation program, then the damages that the Colombian State would otherwise have to pay could be allocated to repair a greater number of victims and in a more coordinated manner. However, that the JPL obliges illegal armed groups, and not the State, to repair victims, means that the number of cases removed from the Court's jurisdiction will be very limited.

Political considerations

The introduction of the JPL involved a 'drawn-out and turbulent' political process with vigorous debate between President Uribe, the legislature, international institutions and civil society.⁷⁵ The failure of President Uribe to build a broad consensus has affected the legitimacy of the JPL and

⁷² JPL, article 51. Note that the United States, although not directly contributing to the material reparation of victims, is providing some financial support (approximately \$US600,000) to strengthen administrative processes related to reparation and reconciliation: see United States' Embassy of Colombia, *Apoyo a Proceso de Desmovilización y Reincorporación de las AUC* (31 May 2006).

⁷³ 'Van 100 Mil Procesos en Justicia y Paz', *El Tiempo* (7 January 2007).

⁷⁴ Interview with Eduardo Pizarro, Bogotá (12 January 2007).

⁷⁵ International Crisis Group, 'Colombia: Towards Peace and Justice' *Latin America Report N°16* (14 March 2006), p. 1.

contributed to it being the subject of constitutional challenge. As a result, President Uribe and others have invested significant political capital in the JPL.

Although the provisions regarding reparation were initially considered of secondary importance to the provisions governing the demobilization of illegal armed groups, the reparation of victims in Colombia has become increasingly political, with growing public support for reparation over the last 12 months.⁷⁶ In particular, hope and expectations have increased within the victim and the non-victim populations that reparation will occur, with approximately 90% of respondents to a recent survey believing that victims should receive compensation for the losses that they have suffered.⁷⁷ However, in contrast to reparation under the JPL, approximately 70% of the same respondents believe that the Colombian Government should play a role in compensating victims.⁷⁸

This support for the Colombian Government to contribute to reparation indicates that non-perpetrators and non-beneficiaries of the conflict are willing to participate in the reparation of direct victims. It also shows that a failure to repair a broad section of the victim population is likely to be perceived across the general population as inappropriate.

Social considerations

Many victims have significant physical and psychological needs as a result of the conflict, which could be at least partially satisfied through material reparation. There are also large numbers of displaced persons, estimated to be 3,832,527 persons at 30 June 2006, whose basic needs include food, housing, education, and medical care.⁷⁹ The distribution of material resources to victims under the JPL will not alleviate these needs for a significant proportion of the victim population.

In addition to not satisfying these basic human needs, social problems could arise from the reaction of the large proportion of the victim population that will receive no material reparation, or from their supporters among the non-victim population.⁸⁰ These reactions could be directed at the non-victim population for not repairing all victims, or at those victims who are fortunate to receive significant material reparation.

⁷⁶ As at March 2006, over 85% of respondents to a survey claimed that members of illegal armed groups should compensate their victims, see International Center for Transitional Justice, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación* (December 2006), p. 34. Over the last 12 months, the attention of the Colombian population has shifted somewhat from demobilization and other issues towards the reparation of victims, with greater discussion of, and interest in, reparation at the political and community level: Interview with Jairo Arboleda of the World Bank, Bogotá, (15 January 2007).

⁷⁷ International Center for Transitional Justice, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación* (December 2006), p. 43.

⁷⁸ *Ibid.*, p. 44.

⁷⁹ Consultoría para los Derechos Humanos y el Desplazamiento, 'Mas o menos desplazado', *Codhes Informa* No. 69, Bogotá, Colombia, (12 September 2006), p. 3. In comparison, note that the Government agency Acción Social estimates that only 1,976,970 persons had been displaced as at 3 February 2007, see Acción Social, 'Acumulado Hogares y Personas Incluidos por Departamentos como Receptor y Expulsor hasta el 3 de Febrero del 2007', (1 March 2007).

⁸⁰ Interview with ex-Senator Rafael Pardo, Bogotá (12 January 2007).

It is argued, however, that recognition of individual loss may have greater reparative effect than when victims are treated as a homogenous group.⁸¹ This is controversial, however, with other commentators arguing that allocating material resources on a case-by-case basis disaggregates victims according to ability to access justice or magnitude of harm suffered, which can therefore be problematic from the perspective of equality.⁸² This was certainly the case in relation to the September 11 Victim Compensation Fund whose significant but individual awards were highly divisive and subsequently regretted.⁸³

⁸¹ Malamud-Goti J. E. and Grosman, L. S., 'Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 554.

⁸² De Greiff, P. and Wierda, M., 'The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints' in De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds), *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006), p. 233.

⁸³ Feinberg, K. F., 'What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11', *Public Affairs* (2005), p. 183.

V. Alternative methods of distributing material resources to Colombian victims

Reason for analysis

Although the JPL framework is already in place, there remains value in comparing this method for distributing material resources with alternative methods. First, the general framework under the JPL still provides the Superior Judicial District Court with some flexibility as to how resources could be allocated across victims, or the framework could be amended to provide for a different method of allocation across victims. Second, guerrilla groups have elected not to engage with the JPL process, so it is possible that circumstances will change in the future such that a different system needs to be adopted for the demobilization of guerrilla groups and the reparation of their victims.

It is also possible that this analysis of different methods for distributing material resources could benefit other countries which are considering designing and implementing reparation programs.

Civil litigation

One alternative means of distributing resources among victims of loss inducing events is to simply allow victims to use the existing legal system and claim compensation under tort law, the law of wrongs, or other relevant laws applicable in the jurisdiction.

Civil litigation takes different forms across countries (and across subject matter), but generally requires a court to determine that the person responsible for the harm has failed to act in a satisfactory manner, to quantify the relevant harm experienced by the particular victim, and to provide compensation for that harm subject to substantive and procedural rules. Justice under civil litigation usually requires that full compensation be made to victims.⁸⁴

Economic considerations

With respect to generating the greatest marginal utility and thereby maximizing efficiency, reparation using civil litigation is likely to be similar to reparation under the JPL; that is, material resources would be distributed to victims subject to the satisfaction of substantive and procedural rules, and then on the basis of quantity of loss where resources are available. Non-pecuniary losses are also usually compensable under civil litigation.

It is possible, however, that civil litigation is more efficient than the JPL because legal standing to make a claim against the perpetrator responsible for one's harm does not require that perpetrator to have elected to demobilize.

That reparation using civil litigation is to occur through the judicial system, albeit without the streamlining provided by the NCCR, means that there could be similar transaction costs (i.e. delays, legal fees, further pain and suffering from having to recount personal experiences, and

⁸⁴ Malamud-Goti J. E. and Grosman, L. S., 'Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 541.

other costs associated with satisfying substantive and procedural requirements). These transaction costs have been estimated to be 54% of the total cost of the United States' tort system.⁸⁵

Also similar to reparation under the JPL are constraints on the capacity of the system. Although there is an existing judicial system in Colombia, 41% of respondents to a Colombian survey stated that they would not use the system because it functions poorly.⁸⁶ Given the potential numbers of victims and increased pressure on the judicial system, it is probable that fair, viable and sustainable reparation would be unlikely to occur under the current system.

Finally, similar to the JPL, providing material reparation in the form of money (rather than services) enables victims to allocate those resources according to their individual preferences.

Political considerations

As with reparation under the JPL, civil litigation would provide satisfactory reparation to only a relatively small proportion of victims. In light of increasing expectations of, and public support for, victim reparation within Colombia, a failure to provide fair, viable and sustainable reparation of victims could lead to exaggerated tensions, less conciliatory attitudes, and significant political consequences.

An advantage of civil litigation, however, is that it treats victims of the conflict equally with victims of other harm inducing events. In the event that victims of the conflict are excluded from the civil litigation system and a system with more limited rights for victims is to apply, questions could be expected as to why non-conflict victims (for example, road accident victims) are entitled to better treatment.

Social considerations

The adversarial nature of civil litigation means it is a rigorous and effective means to determine truth and punish egregious behavior, particularly if criminal sanctions are limited.⁸⁷

As with reparation under the JPL, there is debate as to whether recognition of individual loss has greater reparative effect than that for a homogenous group. Regardless, the provision of material resources to a small and somewhat arbitrary population of eligible victims is unlikely to significantly alleviate many needs of the broader victim population. In addition, awarding damages to victims whose perpetrators may not have sufficient assets to satisfy the award could lead to increased disappointment for the 'fortunate' victims able to obtain decisions in their favor.

⁸⁵ Tillinghast-Towers Perrin, *U.S. Tort Costs: 2002 Update – Trends and Findings on the Costs of the U.S. Tort System* (2003), p. 17. The cost of the tort system comprises victims' attorney fees, administration costs, defense costs, economic damages and non-economic damages. The other 46% of the total amount was that awarded to plaintiffs in the form of economic and non-economic damages.

⁸⁶ International Crisis Group, 'Colombia's Elusive Quest for Peace' *Latin America Report N°1* (26 March 2002), p. 9.

⁸⁷ De Greiff, P., 'Justice and Reparations' in De Greiff, P. (ed), *The Handbook of Reparations* (2006), pp. 452-453.

If only a small proportion of victims receive compensation or long delays are experienced, social problems could result. Reactions from aggrieved victims, or their supporters among the non-victim population, could be directed at the non-victim population for not effectively repairing all victims, or at those victims who are fortunate to receive significant material reparation.

Administrative compensation

Administrative compensation represents a standardized form of reparation. Such a system is usually established by statute and then operates in parallel to the normal judicial system. The process of obtaining administrative compensation tends to be simpler and more flexible than under civil litigation, with specified amounts of material reparation provided to victims according to the type of violation or the type of injury that the particular victim suffered. For example, victims could be awarded a particular amount of compensation based on whether they are internally displaced or involved in a landmine incident, or if they have suffered particular forms of injury or death. However, there is limited consideration of victims' individual circumstances, with some victims therefore receiving less compensation than under individualized schemes.

The source of funds for administrative compensation is not usually the perpetrator of the particular harm. Although available resources may include funds or assets of different perpetrators, all resources are usually pooled before being distributed to eligible claimants.

Economic considerations

Administrative compensation can be less efficient than the JPL and other more individualized forms of reparation. This is because, although individual monetary awards are provided to victims, the amounts of compensation are standardized according to the particular violation or type of harm suffered, and are independent of the individual's marginal utility from being repaired. For example, unlike more individualized systems, a victim who suffers the loss of a leg would generally receive the same amount of administrative compensation, regardless of whether the victim was a professional footballer or an office worker.

However, the process for obtaining administrative compensation is likely to be less arbitrary than under the JPL. Administrative compensation schemes can be established with fewer substantive and procedural rules, such that victims would only need to establish that they had suffered a particular violation or type of harm, and not which particular perpetrator was responsible or that the particular perpetrator had elected to demobilize. Greater flexibility also enables payments for non-pecuniary losses to be limited or avoided altogether, and some potential for the designing of a system that satisfies the requirements of the Inter-American Court of Human Rights.

Transaction costs associated with claiming administrative compensation are much lower for administrative compensation schemes than under the JPL or other individualized forms of reparation. Whereas transaction costs associated with individualized forms of reparation have been estimated at 54% of total costs, the transaction costs associated with administrative

compensation are approximately 15% - 20% of total costs.⁸⁸ Processes to obtain administrative compensation also tend to be relatively quick which saves costs.

Regarding capacity, administrative compensation schemes are often run using specialized tribunals or commissions which are established for the particular scheme.⁸⁹ Although this can require a large, upfront investment in physical and institutional infrastructure, it can facilitate more efficient and context-relevant processes going forward. Much of this infrastructure now exists in Colombia with the establishing of the NCCR.

Political considerations

Not compensating victims for all individual losses, together with administrative efficiencies, mean that administrative compensation schemes usually provide reparation benefits to a greater proportion of the victim population and with fewer delays, but that some individuals receive lower amounts than under individualized systems. This can lead to political problems if victims expect reparation to be commensurate with the level of harm suffered.

An advantage of administrative compensation schemes is that they are able to be crafted to serve broader political objectives and are therefore more consistent with the broader approach to reparation than the individualized judicial approach. This is because compensation can be structured so as to best complement other forms of reparation and to specifically target particular categories of victims. Rather than distributional decisions being left to lawyers and the judiciary, governments retain greater control and can manage competing priorities within the victim population before determining the appropriate distribution of resources

Social considerations

Administrative compensation is likely to facilitate a greater proportion of victims receiving reparation and on less arbitrary terms than under the JPL. However, given the vast number of victims in Colombia, as well as limited material resources for reparation, a trade-off is inevitable between providing greater resources for a few, or fewer resources for many. Although very small quantities of material resources are not likely to have significant reparative effects, it is also unlikely that the total reparative effect would be maximized by fully compensating a small proportion of the victim population and providing no material resources to the remainder.

Treating victims in a standardized manner also has the potential to generate resentment among the victim population because individual circumstances are not fully taken into account in the distribution of material resources. However, given that resentment was generated among recipients of the September 11 Victim Compensation Fund (where individual circumstances were taken into account), to the extent that the Master of the Fund regretted adopting individualized reparation, indicates that no system is likely to satisfy all victims.⁹⁰

⁸⁸ Congressional Budget Office of the Congress of the United States, *The Economics of U.S. Tort Liability: A Primer* (2003), p. 21. Note that these figures do not include victim's attorney fees, which should be minimal if a system for administrative compensation is designed in a sufficiently simple manner.

⁸⁹ *Ibid*, p. 32.

⁹⁰ Feinberg, K. F., 'What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11', *Public Affairs* (2005), p. 183.

Finally, resources for administrative compensation are usually pooled before being distributed to eligible victims. It is possible that the distribution of resources to victims, with at most an imprecise link between the particular perpetrator and the particular resources, would provide less reparative effect than if particular perpetrators were repairing their own victims directly.

Development assistance

Rather than provide material resources in the form of financial payments to victims, it is possible to provide more collective development assistance programs. These programs would take the form of services or programs for target populations, and could include medical and psychological services, education, provision of livestock or seeds, and vocational training. For example, social and medical services were provided in Chile to certain victims of the Pinochet regime.⁹¹

Economic considerations

Development assistance programs are able to be targeted at collective groups. However, given that programs cannot be designed to satisfy the needs of each victim within such groups, reparation benefits are unlikely to be supplied in a precise manner to the victims who would derive the highest marginal utility. Further, because development assistance is not fungible, the supply of particular development assistance may provide zero utility to certain recipients.

Notwithstanding the relative imprecision of development assistance programs, the collective nature of development assistance can lead to efficiencies of scale and reductions in transaction costs from the supply of services across groups of victims. This is particularly so if current programs can be adapted to be appropriate for victim populations, or if existing government or donor institutions can be used in the delivery of such programs. Development assistance is also well-suited for the provision of goods and services with public good characteristics, which without intervention would be unlikely to be provided at an efficient level.

The Colombian Government already spends significant resources on attending to the victim population.⁹² These resources are not provided expressly as reparation and are not provided as part of a broader and more complex program. Although some resources need to continue to be used to attend to urgent needs of victims, some services could be reallocated to form part of a broader and more formal reparation program.

Political considerations

Conflict in Colombia is at least partly due to significant socio-economic division or causes, therefore reparation by development assistance has the political advantage of appearing to be directed towards an underlying cause of the harm-inducing violence.

⁹¹ Lira, E., 'The Reparations Policy for Human Rights Violations in Chile', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 69, and Program on Negotiation and the European Center for Common Ground, *Strategic Choices in the Design of Truth Commissions* (2002).

⁹² See Richards, M., 'Quantification of the Financial Resources Required to Repair Victims of the Colombian Conflict in Accordance with the Justice and Peace Law' *CERAC Working Paper No 3* (December 2006) for different amounts spent by the Colombian Government on different types of victims.

In addition, a recent study shows more Colombians believe that the conflict will be resolved as a result of social development than any other mechanism (including military- and justice-based solutions).⁹³ Of particular note, the greatest support for social development as a response to the conflict is among the victim population. This indicates that a reparation mechanism using social development instruments is unlikely to face significant resistance within the victim population.

Although there currently exists political support for development assistance as a means of reparation, it should be noted that development programs are generally complex and benefits can be either difficult to observe or they materialize over the longer term. It is therefore important that those responsible for the reparation of victims adopt measures to keep victims informed as to what actions have been taken and to ensure that expectations remain reasonable.

A more immediate concern with development assistance is that its reparative effect can vary significantly depending on the type of assistance provided. In particular, the more inclusive the development assistance, or the more that a reparation program provides basic services, the greater the risk that recipients of those services will simply perceive the services as benefits to which they are entitled as citizens and not as victims.⁹⁴ This is particularly so in Colombia where the Constitution expressly provides citizens with rights to health, education and housing.⁹⁵

Finally, as mentioned in relation to other mechanisms, the collective nature of reparation programs means that individual characteristics of victims are not taken into account. This can disappoint some victims who would benefit more from individual reparation. However, equal treatment of groups of victims also has the capacity to reduce tensions within a victim population.

Social considerations

The provision of development assistance presupposes some basic institutional capacity in order to implement development assistance programs. Colombia does enjoy relatively good capacity, and the provision of development assistance as part of a reparation program has the potential to strengthen social institutions within communities and across the country.

The supply of development assistance to groups of victims means, however, that there is minimal connection between perpetrators and the development assistance received by individual victims. This can lead to a lesser reparative effect than if resources were supplied by perpetrators directly to their individual victims.⁹⁶

A final concern is that if development assistance is provided on a regular and long term basis, there is a possibility that it will simply reflect paternalistic attitudes and encourage the dependence of victims on such assistance.⁹⁷ However, this concern goes more to the design and implementation of a particular program, and not to the inherent nature of development assistance.

⁹³ International Center for Transitional Justice, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación* (December 2006), p. 21.

⁹⁴ De Greiff, P., 'Justice and Reparations', in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 470.

⁹⁵ See articles 49, 50, 51 and 67 of the Constitution.

⁹⁶ Hamber, B., 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in De Greiff, P. (ed), *The Handbook of Reparations* (2006), p. 581.

⁹⁷ Rich, H. L., *Colombia Project - Consultation to the World Bank* (2006), p. 20.

Donor preferences

It is very likely that there will not be sufficient material resources available for the complete reparation of Colombian victims. Although donors have traditionally been reluctant to provide significant amounts of funds for the reparation of victims, the probability of attracting external funding is likely to be higher if current and future resources for the reparation of victims are used in a manner consistent with the preferences of donors and potential donors.

Economic considerations

By relinquishing control over the allocation of material resources to donors and potential donors, the Colombian Government is risking that such an allocation of material resources be inefficient and uncoordinated. The less coordinated the allocation of material resources, both in relation to other material reparation and symbolic reparation, the lower the reparative effect from available resources and the greater the potential transaction costs.

Regarding capacity, it has been mentioned that donors are reluctant to contribute to the reparation of victims. It is not clear to what extent repairing victims in a manner consistent with donor preferences could increase contributions to the pool of resources for victim reparation.

Political considerations

The Colombian Government has indicated that it is unlikely to contribute to the material reparation of victims outside of existing social programs. However, the JPL makes express reference to the possible receipt of international donations, and the Colombian Government has done nothing to suggest it would not welcome any such contributions.

Regardless of any desire to receive material resources, the history of the supply of such resources to reparation programs is very limited and questions regarding the legitimacy of the JPL are said to have further reduced the appetite of the international community to contribute.⁹⁸

Social considerations

The advantage of acting in a manner consistent with donor and potential donor preferences is that the pool of resources available for reparation could be increased such that there is greater scope for satisfying victim needs.

If, however, donor preferences are prioritized ahead of those of the victim population, it is likely to lead to tension within the victim population, and perhaps also between the victim population and the non-victim population.

In addition, the supply of resources provided by external donors with no connection to the conflict is likely to have less reparative effect than perpetrators directly repairing their particular victims. The potential effect of perpetrators' resources would also be diminished if they too were distributed among the victim population according to donor preferences.

⁹⁸ International Crisis Group, 'Colombia: Towards Peace and Justice' *Latin America Report N°16* (14 March 2006), p. 17.

Strategic reasons

The reparation of Colombian victims is unique because, whereas the harm inducing event which triggers the need for a reparation program has usually ended before a reparation program commences, the conflict in Colombia continues apace. The Colombian Government is therefore faced with a difficult trade-off; should available resources earmarked for reparation be used to repair existing victims, should those resources instead be dedicated to preventing further victims, or is there an appropriate or optimal combination of the two?

Economic considerations

Allocating material resources for reparation to prevent future victims could reduce the number of future victims and the individual and social costs associated with those victims (provided that the quantity of resources to be allocated to preventing future victims from other sources is not also reduced). In fact, it could be more efficient to prevent harm than to address the consequences of harm at a later point in time. However, in relation to the more narrow consideration of whether doing so provides the greatest benefit to the current victim population, the analysis is misspecified as the needs of current victims are not satisfied at all.

Regarding transaction costs, available resources could be distributed through existing military and development channels. Transaction costs could therefore be very low.

Given that available resources would simply be added to existing resources to protect populations not otherwise protected, or to increase existing protection, there would be few problems of capacity. However, it is not clear that a lack of resources is the binding constraint to preventing future victims, such that there is no guarantee that allocating resources earmarked for reparation to addressing the conflict would in fact reduce the number of future victims.⁹⁹

Political considerations

A failure to provide reparation to current victims would be politically costly to the current Government given the recent shift in support towards reparation of the victim population.

It will always be difficult to quantify how much harm has been prevented by adopting additional precautionary measures. Therefore, the cost of ignoring the needs of current victims is likely to be more politically salient than the benefits that may materialize at a later point in time. Further, any benefits are only relative to the counterfactual (i.e. the number of victims had the extra resources not been spent on preventing future victims) and would be difficult to attribute to resources otherwise earmarked for victims.

Social considerations

A failure to repair current victims completely ignores the immediate needs of a vulnerable population. This in turn has the potential to isolate the victim population and lead to future conflict between the victim and non-victim populations.

⁹⁹ Concept of a 'binding constraint' adapted from that applied to economic growth in Hausmann, R., Rodrik, D. and Velasco, A., 'Growth Diagnostics' (March 2005), p. 7.

VI. Recommendations

The above analysis of different methods to repair Colombian victims is set out in tabulated form in the Annexure and is summarized as follows:

	Economic considerations	Political considerations	Social considerations
Justice & Peace Law	L	M	L
Civil litigation	M	M	L
Administrative compensation	M	H	M
Development assistance	H	H	M
Donor preferences	M	L	L
Strategic allocation	L	L	L

Where:

- H Represents a high rating with respect to the relevant considerations
- M Represents a medium rating with respect to the relevant considerations
- L Represents a low rating with respect to the relevant considerations

On the basis of this analysis, it is desirable that the Colombian Government and the NCCR:

- Continue with their existing policy of repairing victims under the JPL;
- Allocate national resources, or seek external resources, to provide development assistance to vulnerable victim populations who would obtain a relatively high marginal utility from material reparation; and
- Ensure any development assistance provided for reparation purposes is distinguishable from the delivery of basic services that victims would expect to otherwise receive.

In isolation, the arbitrary nature by which victims will or will not be repaired under the JPL, and that the total number of victims who are likely to receive any reparation will be relatively limited, mean that the method of distributing limited reparation resources under the JPL is not as economically, politically and socially attractive as some alternative methods of repairing victims, particularly development assistance programs and administrative compensation schemes.

However, the election and implementation of a method to distribute limited resources to victims does not occur in isolation. The JPL was passed by the Colombian Legislature in December 2005 after a drawn-out and turbulent political process with reluctant compromises accepted by President Uribe, the Legislature, international institutions and civil society. The law has also survived constitutional challenge largely intact. The victim and non-victim populations support reparation and now expect reparation to occur. It would be politically infeasible to completely discard the JPL and try to commence the arduous process again.

But reparation of victims under the JPL alone will not be fair, viable or sustainable. From an economic perspective, the reparation of a very limited number of victims and on arbitrary grounds, will lead to many victims becoming frustrated and possibly igniting further conflict. Meanwhile, adverse decisions of the Inter-American Court of Human Rights in claims brought by those frustrated victims will continue to prove costly, with those same resources unable to be used more efficiently to repair greater numbers of victims. From a political perspective, public support for the reparation of victims is not going to be satisfied by such a narrow and arbitrary program. Finally, from a social perspective, there are many immediate needs among the victim population that will remain unsatisfied without significant and direct intervention. It is therefore imperative that the Colombian Government allocate or source funds for the reparation of a broader section of the victim population, in parallel to any reparation provided under the JPL.

It is recommended that additional funding be distributed across victims in the form of development assistance. This paper indicates that, while not without its disadvantages, the provision of development assistance to Colombian victims is a superior form of distributing limited resources to victims than alternative methods.

However, if development assistance is to be provided to victims, a number of considerations should be taken into account to ensure that the reparation is fair, viable and sustainable.

First, the actual type of development assistance provided will significantly influence the reparative effect. In order to obtain any reparative benefits, the development assistance provided must satisfy the needs of a significant proportion of the target population, which is best achieved through consultative rather than dictatorial mechanisms. The development assistance must also constitute goods or services which the target population would not otherwise expect to receive in the short to medium term. Basic services such as food, water, primary education and some medical care are likely to be perceived as basic entitlements with little or no connection to the victim status of individuals. Examples of development assistance that might be more appropriate depending on the actual needs of the target population include microfinance, vocational training, secondary education or psychological care.

Second, any development assistance must be undertaken in a coordinated manner with other reparation efforts, rather than being left to chance or to individual donor preferences. This is because each of material reparation and symbolic reparation tends to have a greater reparative effect if it is provided together. In fact, providing only material reparation or only symbolic reparation could in fact fuel conflict rather than quell it.

The coordination of a development assistance program could be undertaken by the NCR. To do so, a rigorous examination of the demands on its existing resources would need to be undertaken and appropriate resources guaranteed by the Colombian Government or donors.

Finally, although the Colombian Government should ensure that more resources are allocated to the reparation of victims, the exact amount of resources obtained must dictate the scope of any development assistance program undertaken. Although victims should not be encouraged to expect that they will receive development assistance to the same material value as their individual losses, nor should available resources be spread so thinly that there is little palpable benefit to each victim. The development assistance should be spread across victims or groups of victims in a way that makes a contribution to the quality of life of the particular target population.

VII. Bibliography

- Accion Social, *Acumulado Hogares y Personas Incluidos por Departamentos como Receptor y Expulsor hasta el 3 de Febrero del 2006* (1 March 2007)
- Amnesty International, *El Salvador: Peace Without Justice* (AMR 29/12/93)
- Bentham, J., *Introduction to the Principles of Morals and Legislation* (1789)
- Calabresi, G., *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, CT: Yale University Press, 1970)
- Cole, D. H. and Grossman, P. G., *Principles of Law and Economics* (2005)
- Congressional Budget Office of the Congress of the United States, *The Economics of U.S. Tort Liability: A Primer* (2003)
- Consultoría para los Derechos Humanos y el Desplazamiento, ‘Mas o menos desplazado’, *Codhes Informa No. 69*, Bogotá, Colombia, (12 September 2006)
- Corte Constitucional, Sentencia No. C-370/2006 (18 May 2006)
- De Feyter, K., Parmentier, S., Bossuyt, M. and Lemmens, P. (eds) *Out of the Ashes – Reparation for Victims of Gross and Systematic Human Rights Violations* (2006).
- De Greiff, P. (ed), *The Handbook of Reparations* (2006)
- El Dahshan, M., Richards, M and Tashu, M., *Colombia: Assessing the Macroeconomic Stance, Fiscal Conditions and Volatility*(2006)
- “‘Debemos Pensar en un Impuesto para Reparar’ Dice Ana Teresa Bernal’ *El Tiempo* (20 May 2007), see http://www.eltiempo.com/justicia/2007-05-21/ARTICULO-WEB-NOTA_INTERIOR-3563856.html.
- ‘Gobierno descarta impuesto para financiar la reparación de las víctimas de los paramilitares’ *El Tiempo* (30 January 2007), see http://www.eltiempo.com/justicia/2007-01-30/ARTICULO-WEB-NOTA_INTERIOR-3419166.html.
- ‘No Hay Plata Para 3 Millones de Víctimas, Reconocen Ex Paramilitares Desmovilizados’, *El Tiempo* (17 July 2006), see http://www.eltiempo.com/conflicto/noticias/ARTICULO-WEB-NOTA_INTERIOR-17476.html.
- ‘Van 100 mil procesos en Justicia y Paz’, *El Tiempo* (7 January 2007), see http://dinamico.eltiempo.com/tiempoimpreso/edicionimpresa/justicia/2007-01-08/ARTICULO-WEB-NOTA_INTERIOR-3391110.html.
- Feinberg, K. F., *What is Life Worth?: The Unprecedented Effort to Compensate the Victims of 9/11* (New York: Public Affairs, 2005).
- Gairdner, D., *Truth in transition: The role of truth commissions in political transition in Chile and El Salvador* (1999)
- Giugale, M., Lafourcade, O. and Luff, C., et al (eds), *Colombia: The Economic Foundation of Peace* (2003)
- Hausmann, R., Rodrik, D. and Velasco, A., ‘Growth Diagnostics’ (March 2005)
- Holguín Sardi, C., ‘Comisión de Seguimiento de Justicia y Paz trabaja para brindar a las víctimas todas las garantías para que no hayan abusos y se generen situaciones que desnaturalicen el proceso’ *Boletín de Prensa del Ministerio del Interior y Justicia* (20 December 2006)
- Inter-American Court of Human Rights, *Mapiripan Massacre v. Colombia* (15 September 2005)

- International Center for Transitional Justice, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación* (December 2006).
- International Crisis Group, ‘Colombia’s Elusive Quest for Peace’ *Latin America Report N°1* (26 March 2002)
- International Crisis Group, ‘Colombia: Towards Peace and Justice’ *Latin America Report N°16* (14 March 2006)
- *Law of the General Budget of the Nation 2005* (Ley del Presupuesto General de la Nación of 2005)
- Meiners, R. E., *Victim Compensation - Economic, Legal, and Political Aspects* (1978).
- Ministerio de Hacienda y Credito Publico, *Budget 2002 – 2007* (2006)
- National Commission for Reparation and Reconciliation, *Recomendación de Criterios de Reparación y de Proporcionalidad Restaurativa* (2007)
- Petrucci, C. J., ‘Research Evidence: What We Know about Apology?’, *Behavioural Science and the Law* 20 (2002): 337
- Popkin, M., *Peace Without Justice* (2000)
- Rawls, J., *A Theory of Justice* (1971)
- Restrepo, J. and Spagat, M., ‘The Colombian Conflict: Uribe’s First 17 Months’, *CEPR Discussion Paper 4570* (2004)
- Rich, H. L., *Colombia Project - Consultation to the World Bank* (2006)
- Richards, M., ‘Quantification of the Financial Resources Required to Repair Victims of the Colombian Conflict in Accordance with the Justice and Peace Law’ *CERAC Working Paper No 3* (December 2006)
- Rojas, C., ‘In the Midst of War: Women’s Contributions to Peace in Colombia’ (2004)
- September 11th Victim Compensation Fund of 2001, Federal Register Vol. 67, No. 49
- Sveaass, N. and Lavik, N. J., ‘Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation’, (2000) 69(1) *Nordic Journal of International Law* 35
- ‘Ground Zero Victims’, *The New York Times* (2 March 2007), see <http://select.nytimes.com/search/restricted/article?res=F50617F83D550C718CDDAA0894DF404482>
- Tillinghast-Towers Perrin, *U.S.Tort Costs: 2002 Update – Trends and Findings on the Costs of the U.S. Tort System* (2003)
- United Nations, *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* (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005)
- United States’ Embassy of Colombia, *Apoyo a Proceso de Desmovilización y Reincorporación de las AUC* (31 May 2006), see <http://bogota.usembassy.gov/wwwspc97.shtml#English>.
- World Bank, *Peace Programmatic II: Reparation and Reconciliation in Colombia* (2006)
- World Bank, *World Development Indicators* (2007)