

**The Reparations Game: an analytical framework of reparations in transitional justice processes.**

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# THE REPARATIONS GAME: AN ANALYTICAL FRAMEWORK OF REPARATIONS IN TRANSITIONAL JUSTICE PROCESSES

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## ABSTRACT:

The intention of this article is to stress the topic of reparations in processes of transitional justice from the perspective of political science. In a specific way, we intend to establish an analytical framework of reparations in the context of transitional justice in three levels: justice, administrative dimension and political dimension. Using the results of the review of different international cases and the tools of game theory, we present the ‘reparations game’ from a strategic perspective that copes with context and actors. Two strategies are outlined in order that the victims could overcome the constraints established by the previous political game that arises among government and wrongdoers. Finally we outline some conclusions and recommendations.

**KEY WORDS:** Reparations, transitional justice, constraints, wrongdoers, victims, heresthetics, game theory

## INTRODUCTION

Reparations to victims of acts perpetrated by dictatorial regimes or during armed conflicts between two or more political organizations (States or not) goes back to ancient times, especially in cases of transition from authoritarian regimes to “democratic” ones, and where the main concern refers to the question of what to do with wrongdoers and how to retribute the victims suffering.<sup>2</sup>

However, since WWII, with the co-evolution of human rights international law and the international community interests in avoiding the recurrence of the atrocities committed during that period, reparations and retribution have acquired a great deal of attention.<sup>3</sup> These efforts have been promoted for the last two decades of the twentieth century, due to the proliferation of processes defined as “transitional justice”.

This concept frames the principles, characteristics, steps and mechanisms that have been used and that should be followed in situations of transition from a given state of affairs (i.e.

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<sup>2</sup> For a brief story about different cases of transitional justice in history from ancient Greece to twentieth century see (Elster, ed., 2006).

<sup>3</sup> This can be seen not only by the growing specialization of the literature on the subject, but also by the recent creation of research institutes exclusively dedicated to the field.

authoritarian regime, internal armed conflict, international war, etc.) to a desired state of things (i.e. peace, democratic regime, etc.). Overall, these processes tend to guarantee truth, justice and reparations to victims that have suffered crimes against humanity and human rights violations (De Greiff, 2006 pp- 451-477).

When studying transitional justice processes (TJP), the traditional view centers on the normative and juridical aspects. The literature on reparations is based on the normative aspects (principles and properties) that these situations must address according to international law and in order to fulfill the right of victims to justice, truth and reparation. Because it is focused on aggregated phenomena (juridical processes, tribunals operation, programs design, among others) it has deviated the attention from the political dynamics and strategies that underlie the interactions among different actors (States, wrongdoers, victims, and others) participating in these processes.

In this context, this work aims to address the issue of reparations to victims of human rights violations and crimes against humanity in transitional justice processes, from the perspective of political science. In particular, we establish an analytical framework of reparations in transitional justice processes from three dimensions: justice, administrative and political. As a product of the study of several international cases<sup>4</sup> we outline the reparations game. We also offer some strategies to help victims break the bindings established by the previous political game that emerges between governments and wrongdoers. Lastly we highlight some conclusions and reflections about the research on this field.

In order to fulfill this objective we discuss in first place a definition of transitional justice and reparations, followed by a brief comparative effort of the most recent and relevant cases of transitional justice around the world. Secondly, we develop an analytical framework of reparations based on the three dimensions mentioned above. From this analytical framework, and focusing on the political dimension, we use game theory to model the reparations game. We conclude with some insights on reparations.

## **TRANSITIONAL JUSTICE AND REPARATIONS: MEANINGS, TENSIONS AND LESSONS**

Today, almost every case of transitional justice in the world conforms to the “truth, justice and reparation” formula for victims of human rights abuses (De Greiff, 2006). From an administrative and juridical point of view – the one that has prevailed in most of the

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<sup>4</sup> We studied 10 cases: South Africa, Guatemala, Chile, Argentina, El Salvador, Federal Deutschland Republic (FDR), Peru, Morocco, United States and Colombia. The study of these cases was based on the review of: i) the laws and decrees that defined these processes and the truth and reparations commissions established, ii) the reports and proposals of these commissions, iii) documents and proposals of NGO's and relevant organizations (international and national) in each of those cases, iv) scholarly and journalistic research. For a review of these 10 cases see Casas and Herrera (2007a; 2007b). We studied the US post 9/11 reparations process as a case of reparations without transition and the Colombian case as an ongoing reparation process and of transitional justice without transition.

scholarly studies about transitional justice – these processes tend to provide justice to victims through the setting of temporal rules, procedures and institutions. From a political point of view, on the other hand, these same processes seek to create institutional mechanisms that help in the transition from war to peace, from authoritarianism to democracy or, simply put, from one regime to another.<sup>5</sup>

### **Breaking with the past?**

According to Elster (2006) “Transitional justice refers to the process of breaking with the past in transitions to democracy [...] this includes administrative and professional trials and purges, restitution of property, and compensation for the damage suffered”. Overall, as Uprimny (2006) states “The term ‘transitional justice’ refers to the processes through which radical transformations of a social and political order take place, be it the transition from an authoritarian regime to a democratic one, or from armed conflict to peace”

In this fashion, transitional justice implies selecting one or a set of alternatives among different options for change. It is a process where the interests and expectations of decision makers, victims, and regular individuals are at stake. The outputs that stem from the course of action finally chose have a determinant effect in the individual and collective life of those involved, as well as in the configuration of their present, future, and the way the past is going to be conveyed and remembered.

### **The Justice vs. Peace dilemma: the cost of moving forward**

The transition from a political regime to another implies an inescapable tension between the provision of justice and the achievement of peace. This tension can be boiled down to a decision problem between two alternatives which at first glance may seem at odds: On one hand, to provide justice to the victims of wrongdoings, which includes the right to know what happened (truth), to obtain retribution for the wrongdoings (reparation) and the punishment of the wrongdoer; on the other, to achieve the strategic objective of peace, that is, the end of armed confrontation and the capacity and will of society to move forward (Uprimny, 2006).

As regularity, it can be stated that in a large majority of transitional justice instances the choice favored has been the achievement of peace over the provision of justice for victims. This is due basically to the political and economic needs and restraints present in these cases.<sup>6</sup>

### **What are reparations?**

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<sup>5</sup> According to Elster (2004), in order to classify different reparations episodes it is useful to pay special attention to the nature and duration of autocratic regimes, as well as to the nature and lasting of the reparation process itself. They can also be classified according to a temporal category as pre-transitional and immediate transition

<sup>6</sup> See Elster (2004)

Among the objectives of any TJP, reparations are oriented, in different ways, to undo wrongdoings suffered by victims and their immediate relatives. As a mechanism,<sup>7</sup> and following the broad definition adopted in the context of international law, by reparations we understand any given measure that can be used to redress the different kinds of harms that victims may have suffered as a consequence of certain crimes committed in a violent context (i.e. armed conflict) (Comisión Nacional de Reparación y Reconciliación (CNRR), 2007). Operationally, the concept of reparations is used to designate the design of programs (a more or less organized set of reparative measures) with massive coverage, that constitute intents of providing, directly or indirectly, benefits to the victims of certain types of crimes (De Greiff 2006, p. 453).

According to the criteria adopted by the CNRR in Colombia, and from a restricted view, reparations are understood as a process that seeks to dignify the victims through measures that relieve the suffering, compensate the social, moral and material loss suffered and reconstitute their rights as citizens (CNRR, 2007).

In this sense, the actions related to reparations confront a double challenge: to reach for the impossible, i.e. simultaneously satisfy individual and socio-political needs (Hamber, 2006, p. 582), as well as “find a middle point between the opposite extremes of full retributive justice, on one hand, and absolute impunity in the other” (Uprimny 2006, p. 18).

The difficulty of satisfying simultaneously individual and collective needs of victims, and overall, the constant tension between the provision of justice and peace is a characteristic feature of the different examples experienced around the world between the second half of the twentieth century and the first decade of the twenty first.

## **LESSONS FROM REPARATION PROCESSES**

From the comparative review of 10 different international cases<sup>8</sup> we have reached some conclusions about the dynamic of reparations policies and programs around the World, some of which are presented below:<sup>9</sup>

- 1) Most processes deviated from their initial goals and did not reach their purposes.
- 2) In the majority of cases formal organizations were created (Truth Commissions, Reconciliation Commissions, etc.) to direct transitional justice processes, and their

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<sup>7</sup> Throughout this work we will use the word mechanism in a broad sense, as a reinterpretation of the informal concept presented by Elster (1993, 2007b). A mechanism is a specific causal dispositive for the generation of intentional effects, which links institutional design and expected results. For example, an institution or a set of institutions, public policy plans and programs, political or legal dispositions, standard operating procedures, among others.

<sup>8</sup> These cases are South Africa, Guatemala, Chile, Argentina, El Salvador, FDR, USA, Peru, Morocco and Colombia. However, United States, Colombia and Morocco are not considered strict transitional justice cases.

<sup>9</sup> These conclusions are taken from Casas and Herrera 2007a; 2007b. A must read work on the field of reparations is the volume edited by Pablo de Greiff (2006)

design was characterized by no mandatory power. As a result of their decisions took the form of recommendations that had to be legitimized by another political organization (eg. Congress, Constitutional Assemblies, among others).

- 3) Even though in most cases truth commissions were initially responsible for the design of programs, policies and strategies of victims' reparations, their recommendations did not become into laws, which was seen by victims as a clear proof of a lack of interest from decision makers. An exception to this can be seen in the Moroccan case.<sup>10</sup>
- 4) In most cases, victims and victims' organizations did not have a great deal of influence in the decision-making processes that defined the reparation policies finally implemented. This was due mainly to the previous restrictions imposed by the initial negotiations that originated the transitional justice processes. In the majority of cases victims were not taken into account.
- 5) It can be argued that in the majority of cases victims expressed high levels of dissatisfaction and distrust towards the reparation measures finally implemented.

From these lessons we conclude that the results of the different cases studied, and in particular the reparation measures implemented, did not satisfy victims and their relatives' expectations. International law principles based on truth, justice, reparation and non-repetition of atrocities did not appear to be fulfilled.

A lot of voices argue that these conclusions should not surprise the observers due to the imperfect character of reparations.<sup>11</sup> Such imperfections are associated with two causes: i) material restrictions and ii) the predominance of peace considerations over justice. However, other voices suspect that this is not necessarily true when one takes into account the different studies that have demonstrated the viability of reparations when decision makers are willing to make budgetary reallocations and when international aid agencies show interest.<sup>12</sup> So, the material argument is important but not definitive to condemn reparation processes to imperfection and it may be that other variables affect these situations.

In the purpose of offering alternative views that complement the normative viewpoint characteristic of the literature on victims' reparations in the context of TJP, we offer an analytical framework of reparations. This framework is based on the analysis of 10 international cases and it decomposes reparation processes in three dimensions: justice dimension, administrative dimension and political dimension.

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<sup>10</sup> For a review of the Moroccan case see Opgenhaffen, Veerle y Mark Freeman, *Transitional Justice in Morocco: a progress report*, <http://www.ictj.org/images/content/1/9/197.pdf>, retrieved June 5<sup>th</sup> 2007 and ICTJ, *Summary of the final Report of the Equity and Reconciliation Commission*, <http://www.ictj.org/static/MENA/Morocco/IERreport.summary.eng.pdf>, retrieved June 5<sup>th</sup> de 2007

<sup>11</sup> Usually these voices come, on the one hand, from the actors that must answer before justice and, on the other, from those who have to manage to obtain the economic resources for reparations.

<sup>12</sup> Some studies on the Colombian case are Mark Richards (2006), Camilo González Posso (2006) y Rodrigo Uprimny and María Paula Saffon (2007).

## AN ANALYTICAL FRAMEWORK OF REPARATIONS

In the following pages we present the three basic dimensions featured in any reparation process in the context of TJP.

By an analytical framework we understand a set of assumptions, inference rules and methodological strategies<sup>13</sup> that allow to decompose any phenomena subject to be comprehended, described, explained or predicted.<sup>14</sup> From the analytical perspective in social sciences, doing analysis implies the decomposition of a complex whole in its fundamental parts with the interest of establishing the nature of the relation among its components. This view is developed from the idea that in order to explain politics an analytical point of view comes in handy, even more if we wish to know something else about what will happen tomorrow.

Before presenting each of the three dimensions mentioned above it is necessary to clarify that the first two have a formal character, and probably that is why they have traditionally got more attention in the literature about the topic. The political dimension, understanding politics as Elster (2002) does, that is as the art of binding others, turns out to be ignored by many of the authors who have approached transitional justice and reparations. Our intention is to emphasize on this dimension.

**Table 1. Analytical framework of reparations**

<b>Dimension</b>	<b>Characteristics</b>
<b>Justice</b>	<ul style="list-style-type: none"> <li>▪ Redress the harm caused (material and non material)</li> <li>▪ Legal justice <i>vs.</i> Political justice.</li> <li>▪ Justice materialized by wrongdoers, States or both.</li> </ul>
<b>Administrative</b>	<ul style="list-style-type: none"> <li>▪ Forms acquired by reparation measures and the way they are materialized.</li> <li>▪ Taxonomy according to the way they are designed: 1) broad <i>vs.</i> restricted; 2) judicial <i>vs.</i> Administrative.</li> <li>▪ Taxonomy according to the way they are materialized: 1) “payment in kind <i>vs.</i> monetary”; 2) autonomous programs <i>vs.</i> existing public policies.</li> </ul>
<b>Political</b>	<ul style="list-style-type: none"> <li>▪ Political relations defined as</li> </ul>

<sup>13</sup> The analytical perspective of political science offers a wide range of methodological alternatives. In this article we adopt the methodological strategy of game theory.

<sup>14</sup> See Hinich and Munger (2003) and Shepsle and Boncheck (1997)

	<p>“the art of binding others” (Elster, 2002).</p> <ul style="list-style-type: none"> <li>▪ Reparation processes understood as strategic scenarios for selection of alternatives.</li> <li>▪ ¿Who binds who? States and wrongdoers bind victims.</li> <li>▪ Reparations game between States and wrongdoers.</li> <li>▪ Victims are viewed basically as passive actors.</li> </ul>
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### Justice Dimension

In the wide terms of transitional justice, it is possible to understand justice as the obligation to individualize and sanction the persons responsible for serious violations of human rights in the context of an authoritarian regime or of an armed conflict (internal or external) (Uprimny, 2006, p. 20). Such conception of justice carries out actions of judicial type (usually related to the fulfillment of prison sentences, or the loss of political rights, or the inability to occupy public positions, among others) that punish the acts perpetrated against victims.

Elster (2004) argues that in transitional justice processes two kinds of justice can be present, namely: political justice or legal justice. Though these two types can be understood as ideal types of justice, in the cases studied, and in most cases of transitional justice, justice oscillates between the two of them.

“Pure” political justice appears when the executive branch of government designates in a unilateral way, and without any right to appeal, who are the wrongdoers, and decides how to deal with them without mediation of judicial decisions and with no observance of due process. (Elster 2002, p. 84)

On the other hand, “pure” legal justice is characterized by: a) the laws applied must be as precise as possible (they must not leave very much space to judicial interpretation); b) the judiciary must be isolated of other branches of public power (i.e. no arbitrary selection of judges); c) judges and jurors must be impartial at the moment of interpreting and applying the laws; d) it is necessary that every action adheres to due process (Elster, 2002, pp. 86-88)

Though, and as it was stated *ut supra*, the model that has been used on transitional justice cases borrows from both the ideal types described. It is also true that these processes tend to favor political justice, due to the tension between the attainment of justice and the reaching of peace. This is more likely when transitions are a product of negotiations among the parts



and not a result of the defeat of the preexisting authoritarian regime (or the counterpart in the case of an armed conflict).<sup>15</sup>

The justice dimension in the context of reparations is one of a more specific character, since it seeks to redress the harm caused upon property, physical and mental integrity, the economic and productive capacity, and the individual and collective identities (social, ethnic or communal, depending on each context) of the victims throughout actions that retribute (when it is possible) or repair (when retribution is not feasible) the material and non-material harms caused. Actions placed within this type of justice usually can take the form of payments, pleas of public or private pardon, retribution, the return of land and seized property, among others.

Applying Elster's terminology to the different international cases where reparation measures have been implemented, it is possible to state that these designs present elements of both types of justice. In the Argentinean and Chilean cases, for example, victims of each dictatorial regime resorted, in a first moment, to the ordinary judicial authorities in order to be economically indemnified by the harms suffered during the existence of these regimes. This strategy was accompanied in a second moment by the development of more or less extensive governmental measures of reparation, in which the requirements needed to obtain the benefits from these measures were less demanding in comparison with the judicial ordinary process, and where the possibility of accessing to the reparatory measure was practically assured.

Finally, regarding the justice dimension it is pertinent to clarify that even though it seeks to indemnify the harm caused by wrongdoers, the real dynamics of the different international cases prove that they (the wrongdoers) do not necessarily answer in a direct way for the reparatory measures. In other words, international experience shows that the actions carried out to materialize the reparations, no matter what form they take, can be made by the wrongdoers individually or collectively; or by the State (eg. Argentina, Chile, Morocco and Peru) due to its constitutional obligation. In some other cases they are designed to be assumed by both actors (eg. Southafrica and, to a certain extent, Colombia).

### **Administrative Dimension**

The administrative dimension of reparations refers to the different forms they acquire and the way they are materialized. As we stated in the justice dimension above, reparations can be directed to heal both material and non-material harms, and they can obey, in terms of justice, to any of the two ideal types of justice. Likewise, we affirm that the materialization of reparations programs and policies can relapse both onto wrongdoers and States.

Nevertheless, and according to the analysis of different international cases, it is possible to say that there exist two ways to approach the problem of reparations in its administrative dimension in regard to the forms of their design: a) broad or restrictive; b) judicial or

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<sup>15</sup> To cite just but one example, even the trials taken place after WWII against Nazis in the different occupied countries, although apparently judicially sound (that is, they seemed to respect due process), responded to political considerations too (Elster, 2004).

administrative. On the other hand, there exist also two ways of coming closer to the phenomenon of reparations in regard to the way they are materialized: a) in kind or in money, and; b) autonomous programs or measures inserted in existing social policies.

In the different cases studied we find that these types of administrative reparations are combined in several ways. We found cases in which reparations acquired a restrictive form and were materialized by means of monetary measures (eg. Morocco) or in kind (eg. Chile), or where the judicial form can be combined with the administrative one (Argentina y Chile).

### ***Types of reparations according to their design:***

1. Broad vs. restrictive reparations: As Pablo de Greiff (2006) states, in a broad sense reparations imply all the measures (judicial, administrative, economic, symbolic, etc.) used to compensate the different types of harms suffered by the victims (De Greiff 2006, p. 452). In this context reparations seek to materialize the following five principles: 1) Restitution, understood as the way to return the victim to the situation previous to the violation (*status quo ante*); 2) Compensation, understood as all the measures directed to indemnify the victims suffering; 3) Rehabilitation, refers to the measures aimed to provide social, medical and psychological care to the victims; 4) Satisfaction, consists in displaying actions intended to reestablish the dignity of victims and to promote truth telling; 5) Non-repetition warranties, imply all the measures aimed to avoid the repetition of victimization, as well as measures intended to punish wrongdoers judicially or administratively (De Greiff 2006, p. 452).

On the other hand, the restrictive character of reparations refers to the design of programs of massive coverage, which seek to provide fundamentally economic benefits directly to the victims of certain crimes. In this respect, reparations programs do not need to imply elements of truth-telling, criminal justice or institutional reform (De Greiff 2006, p. 453).

2. Judicial vs. administrative reparations: Reparations by a judicial route are characterized by the assignment of the reparatory measures to victims through the decision of a judicial authority. These decisions usually answer to the legislation and jurisprudence that exists at the moment of the demand on the part of the respective victim.

Likewise, traditionally reparations through judicial means imply big costs (economic, emotional, among others) for the victims, because usually they are the ones who have to verify “beyond a reasonable doubt” that the persons imputed (wrongdoers) committed the damages and prejudices alluded in their respective demands (Malamud-Goti, y Grosman, 2006, p. 544-546).

Reparations through judicial means answer to the classic scheme of civil litigation, because in most cases that these have been used (Argentina, Chile, Germany) they lacked any type of especial legislation to improve the processes in order to benefit somehow the victims of atrocities. On the contrary the victims have faced juridical traditional systems in which the principle of due process reign, which implies that results of the different lawsuits are always uncertain and a product of the existing legal dispositions that define crucial aspects

that difficult the effective reparation of victims, such as the prescription of terms, the presumption of innocence, the principle of judicial individualization and the particular responsibility, among others.

On their own way, administrative reparations are characterized for being a set of programs, mechanisms and measures carried out by a political entity in order to repair victims of authoritarian regimes or of armed conflicts. In this way, administrative reparations are defined in opposition to judicial ones. This can be seen in the requirements related to the proof of the violent acts that are denounced. In administrative reparations this aspect is less demanding on the victims. In addition the period and requirements that are imposed on victims are less rigorous (Malamud-Goti y Grosman, 2006, p. 544-546). In this sense, and in opposition of judicial reparations, in administrative reparations victims experience higher levels of security regarding the attainment of benefits.

***Types of reparations according to the way they are materialized:***

1. Reparations in kind vs. Monetary Reparations: According to the form that the benefits acquire in the different programs, policies or measures, it is possible to distinguish between monetary reparations or reparations through “service packages”.<sup>16</sup>

Monetary reparations are characterized by the adoption of the form of pensions (whether for life or for a given period of time) or indemnizatory payments (usually in a specific and unique sum that seek to compensate the harms done, as is the case in private litigation).

The amount of pensions and indemnizatory payments usually respond to two variables: a) the financial, macroeconomic and fiscal situation of the State that compromises itself with this type of reparations; b) According to the kind of harms, damages and injuries suffered by victims. In this way, evidence suggests that in most cases where this methodology was applied, the payments and/or pensions assigned did not produce the outcomes expected by victims (eg. SouthAfrica, Argentina, Chile and Peru).

On the other hand, reparations through “service packages” are equivalent to direct attention to victims through physical and mental health programs, housing acquisition and improvement measures, psychological care, economic and productive counseling for the formulation of auto sustainable projects as well as work training through formal educational programs, among others.

In other words, reparations in kind or through “services packages” seek to provide in a direct manner benefits to address material needs of victims and their families that have been affected in terms of their wellbeing and their human rights.

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<sup>16</sup> Certainly we refer to material rather than symbolic reparations. The latter are not included in this categorization. Nevertheless, symbolic reparations, from an integral perspective of reparation, raise a challenge to the design of mechanisms for reconstruction and re-elaboration of historical memory and of collective identity. Symbolic reparations imply the overcoming of restrictive views that limit them to the recognition of facts or persons through memorial dates, or the construction of monuments.

According to the cases studied we found that frequently this type of reparations have been accompanied by monetary reparations, since the latter are seen as a necessary complement to the former. (eg. Chile, Argentina, SouthAfrica and FDR). Also, we found out that usually such measures are inserted in existing social policy and not necessarily new institutions or organizations are created exclusively to develop these measures. The following section addresses this important differentiation.

2. Autonomous programs vs. existing social policy: the last typology in the administrative dimension stresses the issue of whether the measures and reparations policies are carried out by means of the design and implementation of new institutions and organizations exclusively in charge of administering them (as was the case in SouthAfrica, Peru and FDR), or on the contrary, they are materialized through the different array of social policy programs that exist for each issue (i.e. housing, education, health, etc.) in a given political organization (as was the case in Chile and Argentina).

The adoption of the first type of reparations, that is reparations materialized through autonomous programs, implies the recognition of the especial nature of victims and the suffering experienced by them during armed conflicts (internal or external) and dictatorial regimes. Nevertheless, it also represents big transaction costs, in the sense that the establishment of new institutions and organizations is not exempted of internal and external pressures and neither of the institutional, cognitive and economic path dependence (Mantzavinos, North and Shariq, 2004).

Last but no least, inserting reparation measures and policies into the existing social policy reduces transaction and production costs associated with their implementation. However, this view increases the risk of minimizing and ignoring victims' voices, their suffering, as well as the probability of getting punishment for atrocities out of the picture.

Authors like Uprimny and Saffon (2006), draw attention to the confusion between reparations and social policy. Although reparation and social policies have undoubted links, it is useful (and necessary for justice sake) not to mix them up, and especially not to believe that the aims of the former can be accomplished faithfully through the use of the latter.

## **Political Dimension**

The political dimension of reparations is related to the strategic nature of any social interaction.<sup>17</sup> In this way, and following Jens Arup Seip, politics is not about people trying to bind themselves; it is about binding others (Elster, 2002, p. 11). In this sense, and according to Elster (2002), we understand politics as the art of binding others at a macro-level or micro-level contexts that are related or affected by an authoritative allocation of values in a society (Easton, 1951).

Likewise, and if transitional justice is considered as a process of breaking with the past in order to reach a wished state of affairs, it is possible to affirm that TJP constitute an

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<sup>17</sup> As Binmore (2007) points out that games are played whenever people interact, wherever there are strategies to adopt and outcomes or prizes to win.

strategic scenario that implies the selection among different alternatives of social change. From a broad point of view, TJP are processes in which people try to bind others in the context of time in order to: a) reduce the uncertainty ever present in the transition from war to peace, and; b) generate trust through the compliance of the restrictions and the costs associated to the actions that tend to repair harms, damages and injuries occurred in the context of armed conflict or in a particular regime.

Such decisions are expressed through the mechanisms chosen to facilitate and develop these processes, or to prevent the instrumentalization of transitional justice as a mean to reach negative peace. In addition, reparations seem to be a powerful mechanism for generating trust and cooperative behaviors that may improve the “social tissue” and living conditions through the strengthening of social capital.

If our idea can be accepted, that is that reparations in their political dimension may be analyzed as mechanisms that individuals and groups use in order to bind others, it is necessary to ask: Who ties who? The international experience demonstrates that the actors that traditionally define the binding mechanisms that make peace possible are usually the wrongdoers and the political organizations that negotiate with them (in case of negotiated transitions) or the victory powers (in the case of conflicts solved militarily, as in the case of Germany). From this point of view, these bindings are mainly and exclusively defined between these two players, but their decisions affect directly the victims’ situation. Particularly the victims’ capacity to claim truth, justice and redress against human rights violations and the crimes against humanity committed.

Thus, the political dimension of reparations implies strategic interactions (games) where there are two main actors involved (wrongdoers and States). The possibility of a three players’ game (wrongdoers, victims and States) is reduced by the fact that victims play more a passive role rather than an active one, because their capacity for action is constrained by the prior decisions already made in the negotiations between wrongdoers and States.

Perhaps this is the most relevant feature of the political dimension of reparations, that is the strategic interaction between different stake holders. Unfortunately this subject has been neglected by the traditional literature on the subject. This is based primarily on the perception of victims as mere *objects* of reparation.<sup>18</sup> However, even when this view is valid and necessary, if it is not complemented, it limits the possibility of approaching the phenomena of reparation processes as open and dynamic, and the victims as actors with desires and beliefs, intentions and positions, that can reach exits to the political game that underlies reparation processes.

In order to reach a better understanding of reparations political dimension, and using the tools of game theory, We outline a reparations game where we try to highlight and model the strategic aspects of reparations as binding mechanisms.

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<sup>18</sup> That is, victims are seen as subjects of rights and prerogatives such as truth, justice and reparation.

**Table 2. Analysis of 9 cases using the analytical frame work of reparations**

<b>Country</b> / <b>Dimension</b>	<b>Justice Dimension</b>	<b>Administrative Dimension</b>	<b>Political Dimension</b>
<b>South Africa</b>	Political justice, materialized by the State	Design: restrictive and administrative. Materialization: monetary	State and wrongdoers bind victims
<b>Guatemala</b>	None	None	State and wrongdoers bind victims
<b>Chile</b>	Both political and legal justice, materialized by the State	Design: restricted and administrative. Materialization: in kind + monetary and inserted in existing public policy	State and wrongdoers bind victims
<b>Argentina</b>	Both political and legal justice, materialized by the State	Design: restricted and administrative. Materialization: in kind + monetary and inserted in existing public policy	State and wrongdoers bind victims
<b>El Salvador</b>	None	None	State and wrongdoers bind victims
<b>FDR (Germany)</b>	Legal justice and materialized by the State	Design: restricted and judicial. Materialization: monetary	State binds victims (even though victims had certain degree of influence)
<b>Peru</b>	Political justice, materialized by the State	Design: broad and administrative. Materialization: in kind + monetary + autonomous reparation programs	State binds victims (even though victims had certain degree of influence)
<b>Morocco</b>	Political justice, materialized by the State, who was the wrongdoer	Design: restricted and judicial. Materialization: monetary	State (wrongdoer) binds victims
<b>Colombia (this is an ongoing case, evidence is still provisional)</b>	Legal justice and materialized by the State and wrongdoers	Design: broad and judicial-administrative; Materialization: monetary	State and wrongdoers bind victims

### **The Reparations Game**

Using the tools of game theory we seek to formalize the political dimension of reparations according to the idea that what is at stake when designing and implementing reparation policies is the binding of others regarding the authoritative allocation of values that will result of this process.

More specifically, and as we already stated, the effect of the political game between those who negotiate the transition ties victims in relation to the authoritative allocation of certain values: the nature of possible measures of reparations, as well as their scope. In concrete terms the reparations game helps identify what the victims get, how they get it and from whom (State, wrongdoers or both). The game is limited to the context of a negotiated transition to peace, where two main parties, State and wrongdoers, must “agree” about: who will get reparation? How is it going to be done? And how much will be repaired?

We assume that for the actors involved in this game reparation is imperative. That is, the problem of whether to repair or not is out of the question, and it is also assumed that the victims of the atrocities committed must receive some sort of compensation from the harms and damages suffered. This assumption is justified by the current international context, the advances in international law, especially related to human rights and international humanitarian law. In today’s world there is a great deal of pressure from various international actors that reduces the probability of impunity in post-conflict scenarios, and in particular, in transitions to democracy. This means that those who have suffered the humiliations of war and/or from repressive political systems are more likely to benefit from measures of truth, justice and reparation.<sup>19</sup>

This framework deals with the problem of “How to repair”. This is the strategic problem we intend to formalize through a game tree consisting of two players: State and wrongdoers. Before developing the game it is necessary to clarify the assumptions that underlie and define this kind of situation:

1. We seek to model a two player’s game: State and wrongdoers. In this sense we assume initially that State and wrongdoers are two different players capable of making independent decisions and whose negotiation gives birth to the transition process.<sup>20</sup>
2. It is also assumed, for reasons of simplicity, that State plays first followed by wrongdoers.<sup>21</sup>
3. Payments that are allocated to each of the players are variable in nature, i.e. the utility they represent is ordinal rather than cardinal.<sup>22</sup>
4. The strategies available to each player are the same, namely: i) to commit resources (time, money, reputation, work, etc.) to carry out “broad” reparations (**STRATEGY**

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<sup>19</sup> It should also be noticed that besides international pressure there are domestic pressures from various stake holders, both private and public, i.e. mass media, labor unions, NGO’s and others that may insure a minimum level of justice, truth and reparation for victims.

<sup>20</sup> This analytical exercise is useful even in cases where wrongdoers are part or control the State apparatus (eg. Argentina, Chile and South Africa) because in this contexts the wrongdoers also have to negotiate with those groups that will gain access to the State apparatus that will ultimately define the way reparations will be implemented.

<sup>21</sup> The order of the actions of players does not alter the equilibrium of the game. We use this convention to highlight that we are strictly speaking of a sequential rather than a simultaneous game.

<sup>22</sup> While the strategies that can be chosen by each player involve measurable material costs (in terms of money, time, opportunity costs, or political support, among others) it is also true that they vary in each case. That is why we use ordinal payments to reflect the actors’ preference orders for each possible outcome.

A) or; ii) to commit resources to carry out “restrictive” reparations (**STRATEGY B**).<sup>23</sup>

The assumptions presented above are directly related to the form the reparations game acquires in the context of a negotiated transition. Moreover, it is necessary to outline the assumptions that define the payments for each player:

1. It is assumed that the player “State” faces, on the one hand, political restrictions imposed by different actors that seek their own agenda regarding the reparation measures that will be implemented and that have veto power over these decisions,<sup>24</sup> and on the other, macroeconomic restrictions and fiscal obstacles that spoil the possibility of carrying out “broad” reparations, especially when faced with a context of scarce resources defined by a political agenda that gives priority to other problems. This has been the case of post-conflict scenarios where goals like the strengthening of security policies, infrastructure development and comprehensive social policy, reduction of poverty and economic growth, are just as important.
2. In the case of the player “wrongdoers” we assume that regarding the dilemma of “justice vs. peace” it wishes to obtain peace at the minimum cost possible, that is, without justice for victims or with the minimum of justice required. In this sense, this player has a clear interest in the less costly reparation measures possible (legally, economically, politically and in terms of public image), because the contrary constitutes a negative incentive to cease their violent actions.

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<sup>23</sup> In the context of this game the idea of “broad” or “restrictive” reparations is not strictly related to the categories presented above in the administrative dimension. In this particular situation, broad or restrictive reparations imply the question of how inclusive (in terms of the number of victims to be repaired and the types of crimes included), how generous (in terms of the material and non-material resources involved) and how accessible (in terms of requirements the victims must fulfill in order to be repaired) reparations are. In this sense we assume that “broad” reparations are more inclusive, generous and accessible than “restrictive” reparations. This means that the former are more expensive for each player than the latter.

<sup>24</sup> Among these actors we find political parties, military leaders, civil society organizations, mass media, etc.

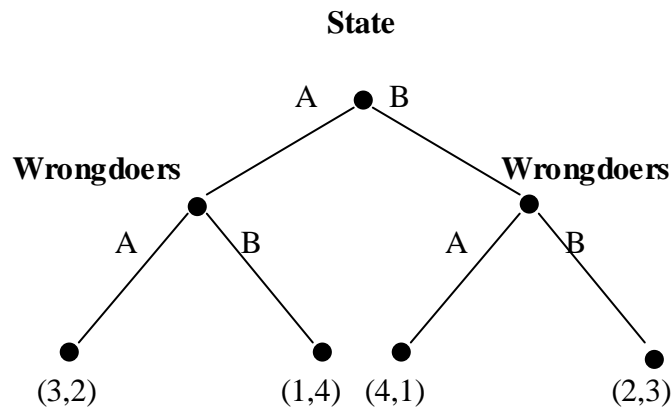


The following payoff matrix is derived from the above:

**Table 3. Reparations game payoff matrix**

Possible outcomes	State	Wrongdoers
(A,A)	3	2
(A,B)	1	4
(B,A)	4	1
(B,B)	2	3

**Figure 1. The reparations game between State and wrongdoers**



In this game tree, player State plays first and, as stated above, this does not affect the logic of the game, that is, “wrongdoers” could play first and it would not alter the final outcome. We choose “State” to play first because that is what we have found from the majority of cases surveyed. Player “State” is confronted with the possibility of choosing between two strategies: A (Broad reparations) and B (Restrictive reparations). Each of these strategies is represented by the upper branches of the tree, followed by two black nodes that correspond to the possible moves player wrongdoers can make after Player State.

In this sense, player wrongdoers can play the same two strategies as Player State; hence the four lower branches of the game tree. After each possible combination of strategies<sup>25</sup> the payoffs that result from them are outlined.

By using the method of *backward induction*, we find that the game's Nash equilibrium is given by the combination of strategies (B,B), meaning that both players choose to follow the alternative that compromises resources to carry out "restrictive" or "minimal" reparations.

The main implication of the reparations game is that the normative idea concerning that reparations should be as inclusive, generous and open as possible is likely to be eroded by the interests and incentives players have. Furthermore, it is important to keep in mind that the players choose under constraints, both accidental and self-imposed.

This is due primarily by the weight restrictions (economical and fiscal) have upon decision makers perceptions and the interests they have regarding the achievement of peace (understood as cessation of hostilities), even at the expense of the procurement of justice to victims, on the one hand, and by the wrongdoers clear and obvious interest of getting the benefits of transition at the minimum cost possible in economic, political, judicial and "image" terms, on the other.

Then, the problem lies not only in that the normative formulation reparations is inconsistent with the real interests that the players involved may have. The real problem stressed by this game is that if incentives and mechanisms to influence or change the dynamics of the reparations game are not provided, reparations, their mechanisms and their scope will probably be limited, will probably adversely affect the rights and expectations of victims and may generate pervasive incentives that motivate "shortcut" behavior, grudges and shameless attitudes over time.<sup>26</sup>

The game's outcome is manifested when the wrongdoers are, or have been, part in the recent past, of the State apparatus, or if they have become highly influential at the local level. This creates difficulties because of the clear aversion to give power to those they victimized in the past (e.g. Argentina, Chile and South Africa) and that are now out of their sphere of influence. In such cases the incentives for restrictive reparations are even greater. In fact, it can be said that there is no incentive for wrongdoers to fully repair victims.<sup>27</sup>

However, in contexts like these the question is: what do wrongdoers and States expect from victims? The answer, though disappointing is obvious: for victims to accept "any" measures or policies that are proposed for reparation. The main reason that this alternative becomes the dominant strategy for victims lies in the fact that they are constrained by the

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<sup>25</sup> As can be seen in the tree and the payoff matrix, there can only be 4 combinations: (A,A) (A,B) (B,A) (B,B)

<sup>26</sup> For a reflection on "shortcut" behavior see Mockus and Cante (2005), and Drago, Cante and Ortiz (Eds., 2005)

<sup>27</sup> In cases such as Argentina and Chile, reparation measures and programs were implemented long after wrongdoers step out and democracy was reestablished.

previous decisions made by the State and wrongdoers, because these two players are the ones that decide how reparations are distributed among victims.

The latter is the perverse result for victims that stems from the game. Because of fear, powerlessness, disarray, economic vulnerability, the risk of victimization and, above all, the desire to close this chapter, the lack of interest upon time and apparent efficiency of an immediate benefit may motivate many victims to accept restrictive reparations such as indemnizatory payments or existing social policy measures for reparatory value. Furthermore, in the presence of the possibility of reaching a negative peace (understood as absence of violence) many governments are willing to sacrifice justice.

In other words, victims “play” after State and wrongdoers or, narrowly, it can be said that victims do not play at all in this game. Evidently this situation arises from the fact that States and wrongdoers actions are not spontaneously connected in a strategic manner with victims. Evidence shows that victims participate only after this first phase (States-wrongdoers negotiation) has already occurred.

The statement presented above is supported by the available evidence from the different TJP around the world. In the vast majority of cases victims and the organizations that represent them initially do not show a great deal of influence in the decision making processes that led to the design and implementation of reparation policies finally displayed. You may ask why? Fundamentally because of the role played by the previous constraints imposed upon the process by the initial negotiations that gave birth to them.

### **Is there a way out of the reparations game?**

Given this scenario, the question is then: Is there a way out of the reparations game? What exits are available when one is previously constrained by a game in which one has no saying? In fact, the question that arises is whether victims could do better than the shackles imposed by the other actors. Or if on the contrary, they are doomed to accept “any” proposal that State and wrongdoers may offer.

Solving this problem is undoubtedly worthy of a much profound reflection, However, we only outline here, in a very short and tentative manner, two possible exits or external solutions to this game: one points to the macro level, and the other to the micro level.

*Exit 1: Reformulating the game.* This first exit consists in generating a total different game, where actions carried out by victims and/or their representatives may produce a real interdependence among the three players. In other words it would be required for victims to play first, or at least secondly, or better yet that the game is played simultaneously rather sequentially, meaning that all players play at the same time. This would be possible due to the learning achieved through the international experiences and the presence of international actors that instead of being mere bystanders are willing to act as allies in the process.

The question now is: how to raise a different game? In practical terms, to establish a different game requires actions that will generate constraints that enable victims, and their representatives, to actively participate in the negotiations that shape the transitional process

or the initial design of reparation policies at the macro level. This involves efforts in terms of political organization, mobilization and agency within the different victims' organizations and towards other public and private organizations. In this way victims will enable themselves to exert the influence necessary to play a role in the process. This must be done preferably in a formal way (through a position inside the organizations created for reparation purposes), although it could be done also in an informal manner (through social pressure or international pressure). It is indispensable that victims influence the processes that lead to the identification of the features that will define the transition (towards peace or democracy).

It is necessary that strategies mentioned above will be joined by other factors such as domestic pressure from various political, social, economic and cultural forces (i.e. to have the support of political parties or movements, labor unions, religious organizations, among others) as well as international pressure that promotes the idea that "the voice of victims" must be heard in an early stage of the process that defines transition and reparation measures.

*Exit 2: Heresthetics.* The second exit to the reparations game suggests playing heresthetically at the micro levels of reparations policies or programs. The concept of *heresthetics* has a Greek origin, even though it was William Riker who used this word for analytical goals. The root of the word means "choosing and electing" (Riker, 1986, p. ix). In other words, Riker used the term to designate what he called the "art of creating situations", i.e. "to structure the world so that I can win" (Riker, 1986, p. ix). In this way a person heresthetically skilled is a person that is able to handle, manipulate and maneuver in adverse contexts to assure the occurrence of the state of the world desired.<sup>28</sup>

When this exit to the reparations game is drawn (that is when victims or their representatives play heresthetically at the micro level) what it is intended to assure is that victims benefit the most and that they can break the shackles (constraints) imposed initially by those who have made the decisions about the type of reparation measures or policies that will be implemented.

This means that victims do not need to influence, directly or indirectly, the reparations game as such, that is, the negotiations that defined the characteristics of the transition and reparations, but to play at the intermediate levels where these policies are developed and carried out. For instance, in most of the international cases studied, the design and implementation of reparation policies have fallen into the hands of organizations that can be referred as Truth Commissions or Reparation Commissions. In this context, the concept of heresthetics comes into play in order to define reparations in practical terms.

Thus, this second exit to the reparations game implies that victims, or their representatives, must carry out strategies that enable them to: i) influence the management of specific reparation measures; ii) impact specific organizations responsible for the design and implementation of the measures (generic or specific State agencies, national or local, centralized or decentralized, etc.); iii) spark attention from key international actors. In order

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<sup>28</sup> For a study of heresthetics see also Riker (1984)

for victims (and their families) to achieve the best possible payoff it can also be useful to strategically use tools such as rhetoric, agenda control, coalition building with different actors, etc.

## Conclusions

We have tried to present the idea that reparations can be seen as binding mechanisms. And their transforming potential should be studied, analyzed and applied with care, due to what is at stake.

Thus, this analytical exercise seeks to raise interest around concerns such as:

- a) Regarding the process of transitional justice: Who estimates the cost of moving forward? Who are the ones that finally take such a decision? Who really pays the costs?
- b) Regarding the actors' decisions: Who binds who? Who is going to repair? Who is going to be repaired? How reparations are going to be displayed? How much is going to be repaired? What is going to be repaired?
- c) Regarding the victims' point of view: What do States and wrongdoers expect from victims? Should victims accept "any" reparation measures and policies offered? What exits from the reparations game are available for victims? What are the alternatives when one is previously constrained by a game in which one has no saying?

There remains factors to be analyzed that are related to the definition of the appropriate alternatives given to each actor, the effects of time on decisions and actions, and in particular, the risks of negative coalitions that, as Elster (2006) states, should be taken into account by those that are interested in the study of these phenomena and for the people and organizations involved in reparations activities.<sup>29</sup>

Through a comparative review of the reparation cases analyzed here, we confirmed the idea that the literature concerning TJP, especially the one that studies reparation policies for victims, does not see victims as active agents, but as mere bearers of rights and benefits for the harms suffered.

In the vast majority of the cases examined victims and their representatives have not reached a great deal of influence regarding the decision making processes that led to the reparation policies and measures finally implemented. This little influence is explained mainly by the previous constraints imposed by the initial negotiation processes that gave birth to them. In most of these processes victims were not taken into account, and even worse victims expressed high levels of dissatisfaction and distrust regarding the reparation measures finally implemented.<sup>30</sup>

We found that two effects are waiting to be explored in the literature on reparations: First, the perverse incentives that give order to the phenomena of the preference for more

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<sup>29</sup> For a detail presentation of the analytical framework presented by Elster see Elster (2004, 2006)

<sup>30</sup> For evidence pertaining this aspect see De Greiff (2006) and Kiza, Rathgeber and Rohne (2006)

immediate gratification, whose effect may be socially detrimental for the construction of social capital. Secondly, the perverse incentives that may motivate the reproduction of violence.

From a strategic perspective the possibility of breaking the constraints of the reparations game is related to the degree of redignification of the victims and the enforcement of the obligations States and wrongdoers must comply under international law. It is also an open question how to satisfy justice principles without breaking peace agreements. The political key could be found in an effective agency, collective action that strengthens victims' organizations and the ability to build political effective coalitions that lead to a positive aggregation of interests (Elster, 2006, p. 227)

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