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The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context

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Abstract

Part I of this Note provides a brief political history of Nepal since the mid-eighteenth century; defines the concept of transitional justice; and explores the international law of remedy, reparations, and compensation. Part II focuses on the right to individual compensation in order to determine which human rights violations trigger a state's legal obligation to compensate victims, and then applies that right to the transitional justice context. Finally, Part III proposes the design of an individual compensation program in which Nepal, and other transitional states, can fulfill legal obligations while simultaneously working toward peace, democracy, and development.

THE INTERNATIONAL LEGAL RIGHT TO INDIVIDUAL COMPENSATION IN NEPAL AND THE TRANSITIONAL JUSTICE CONTEXT

Matthew F. Putorti *

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INTRODUCTION

Some consider Nepal to be Shangri-la—or earthly utopia—but its current situation is far from that. Having only emerged in 2006 from a ten-year internal conflict that left over 13,000 people dead, Nepal is seeking its own Shangri-la: peace, democracy, and development. This journey, however, is complicated by the numerous human rights violations committed by the state during the internal conflict. Not only do those whose human rights were violated want redress from the state, but international law

encourages—and sometimes mandates—justice for victims. Providing that justice can be problematic for states like Nepal that are attempting to transition away from war and authoritarian rule toward peace and democracy, yet are underdeveloped and impoverished.

Transitional justice is premised on the notion that a society cannot have closure—and subsequently progress—unless it addresses the problems of its past.[1] To achieve these goals, transitional justice offers a range of mechanisms through which a state can provide truth and justice to victims of human rights violations.[2] One such mechanism is individual compensation.[3] This Note explores the intersection of transitional justice and international human rights law concerning the right to individual compensation. It examines the human rights violations for which individual compensation is legally required and discusses the alternative paradigm of compensation-as-development as a potentially better solution to achieve the goals of transitional justice.

Part I of this Note provides a brief political history of Nepal since the mid-eighteenth century; defines the concept of transitional justice; and explores the international law of remedy, reparations, and compensation. Part II focuses on the right to individual compensation in order to determine which human rights violations trigger a state's legal obligation to compensate victims, and then applies that right to the transitional justice context. Finally, Part III proposes the design of an individual compensation program in which Nepal, and other transitional states, can fulfill legal obligations while simultaneously working toward peace, democracy, and development.

I. *NEPAL, TRANSITIONAL JUSTICE, AND INTERNATIONAL LAW*

Nestled in the Himalayas and situated between India and China, Nepal is in transition. In 2006, Nepal's government and the Communist Party Nepal-Maoists signed the Comprehensive Peace Agreement ("CPA") ending a decade-long internal

1. *See infra* note 63 (defining transitional justice).

2. *See infra* I.B.2 (outlining truth commissions, prosecutions, and reparations as mechanisms of transitional justice).

3. *See infra* note 117 (listing compensation as a category of reparations).

conflict during which many human rights violations occurred.[4] In 2008, Nepal's legislative body declared the state a secular republic.[5] Despite these developments, Nepal cannot yet be described as a peaceful, democratic society that has wholly emerged from conflict and authoritarian rule.[6]

International human rights law imposes obligations on states to give redress to victims of human rights violations, and transitional justice recognizes that peace and democracy cannot be achieved unless the state provides retroactive justice for human rights violations. The intersection of these two paradigms—transitional justice and international human rights law—is the point at which transitioning states can fulfill their international legal obligations, while ensuring that sustainable peace and democracy are realized. Nepal provides a case study of how an effective transitional justice program should be structured at that intersection. The lessons learned from Nepal could be adapted to other transitional societies.

Part I.A explores the modern political history of Nepal from the mid-eighteenth century to the present, including the internal conflict that lasted from 1996 to 2006. Part I.B outlines the concept of transitional justice, including its definition, goals, and mechanisms. Part I.C reviews international law on the right to remedy, reparations, and compensation for human rights violations.

A. *A Brief Political History of Nepal*

1. Nepal from the Mid-Eighteenth Century to 1990

A hereditary monarchy was established in Nepal in the mid-eighteenth century by the Shah family, which ruled for 240 years.[7] This period included one hundred years during which

4. *See infra* note 33 and accompanying text (describing the signing of the Comprehensive Peace Agreement ("CPA")).

5. *See infra* note 36 and accompanying text (describing the abolition of the monarchy and the declaration of Nepal as a secular republic).

6. *See infra* notes 35–50 and accompanying text (detailing the current political problems in Nepal).

7. *See* Michael Hutt, *Monarchy, Democracy and Maoism in Nepal, in* HIMALAYAN PEOPLE'S WAR: NEPAL'S MAOIST REBELLION 1, 2 (Michael Hutt ed., 2004) ("The Shah kings . . . are generally credited with having created the modern nation-state now known as Nepal."); TERESA WHITFIELD, CONFLICT PREVENTION AND PEACE FORUM/CR. ON

Nepal also had hereditary prime ministers whose governing powers were greater than those of the monarch.[8] From 1962 until 1990, Nepal experimented with the *panchayat* system of governance, which was described as representative, but was in reality one-party rule directed by the monarchy.[9] Frustrated with their lack of real representation, Nepalis started *Jana Andolan* (People's Movement) I in 1990, which resulted in then-King Birendra establishing a constitutional monarchy in a democratic state.[10] This first attempt at democracy was ineffective, however, as political infighting and corruption produced a rapid government turnover.[11]

2. Communists and Maoists in Nepal

The Communist Party of Nepal ("CPN") traces its roots back to 1949 in Kolkata.[12] As the party developed, and for various

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INTERNATIONAL COOPERATION, MASALA PEACEMAKING: NEPAL'S PEACE PROCESS AND THE CONTRIBUTION OF OUTSIDERS 3 (2008) ("Nepal was ruled by a feudal and exclusionary monarchy for more than 200 years."). *See generally* MANJUSHREE THAPA, FORGET KATHMANDU: AN ELEGY FOR DEMOCRACY 57–79 (2d ed. 2007) (providing a detailed history of the Shah family).

8. *See* Hutt, *supra* note 7, at 2 ("[T]he Shah kings' power was eclipsed by a courtly family which adopted the title 'Rana.'"); Whitfield, *supra* note 7, at 3 (noting that the hereditary Rana prime ministers ruled Nepal from 1846–1951). *See generally* THAPA, *supra* note 7, at 57–79 (providing a detailed history of the Rana dynasty).

9. *See* Brad Adams, *Nepal at the Precipice*, FOREIGN AFF., Sept.-Oct. 2005, at 121, 124 ("The *panchayat* system was touted as a representative system, but in reality the country was run by a cluster of like-minded undemocratic politicians who obeyed the will of the king."). *See generally* THAPA, *supra* note 7, at 104–05 (describing elections under the *panchayat* system and noting that the king directly appointed sixteen members to the National Panchayat and "retained absolute power").

10. *See* Adams, *supra* note 9, at 124 ("In April 1990, following months of nationwide strikes and agitation, King Binrendra . . . finally gave in to popular demands to lift the ban on political parties and create a democratic state."); Whitfield, *supra* note 7, at 3 ("[The *panchayat* system] was brought to an end in 1990 when a pro-democracy 'people's movement' forced the then King Birendra to agree to multi-party democracy within the framework of constitutional monarchy.").

11. *See* Adams, *supra* note 9, at 125 (noting that after the peoples' movement, Nepal had thirteen increasingly unstable governments marked by political feuds and corruption); Whitfield, *supra* note 7, at 3 ("The political system was undermined by factionalism, shifting coalitions and alliances among and between parties, and consequently a rapid succession of governments, particularly in the years of a hung parliament between 1994 and 1999.").

12. Deepak Thapa, *Radicalism and the Emergence of the Maoists*, *in* HIMALAYAN PEOPLE'S WAR, *supra* note 7, at 21; *see also* Hutt, *supra* note 7, at 3.

reasons, the CPN split into different factions.[13] For this Note, the most important of those factions is what would become known as the Communist Party Nepal-Maoists ("CPN-M" or "Maoists"). Led by Pushpa Kamala Dahal, commonly known as Prachanda, and with Baburam Bhattarai as its ideologue, the CPN-M is considered to have the most leftist ideology of the various Communist factions.[14] In March 1995, the CPN-M decided to bring a democratic revolution to Nepal.[15] On February 4, 1996, the party released its "Forty-Point Demands," which called for (1) the expulsion of foreign influence in Nepal, (2) the establishment of a secular democracy and the end to various types of discrimination, and (3) economic reforms to benefit the poor and marginalized.[16] After the government quickly rejected the demands, the Maoists started what would become known as the "people's war."[17]

3. Nepal's Internal Conflict: 1996–2006

The monarchy and the state were unprepared to fight the Maoists in part because the state initially categorized the conflict

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13. *See* Hutt, *supra* note 7, at 3 (noting that the Communist Party of Nepal has splintered); Thapa, *supra* note 12, at 21–37 (providing a history of the Communist Party of Nepal ("CPN")).

14. *See* Thapa, *supra* note 12, at 21, 34–37 (providing a history of the Communist Party Nepal-Maoists ("CPN-M") and noting that it has an "ideological stance that is farthest left"); Adams, *supra* note 9, at 127 (noting that the CPN-M broke away from the Communist Party Nepal and is led by Pushpa Kamal Dahal).

15. At its Third Plenum in March 1995, the CPN-M wrote its "Strategy & Tactics of Armed Struggle in Nepal." *Strategy & Tactics of Armed Struggle in Nepal*, CPN-MAOISTS, Mar. 1995, *available at* http://www.ucpnm.org/english/doc2.php. The document outlines, inter alia, the target and motivating forces for an armed struggle and notes that the CPN-M "has formulated a political strategy of completing New Democratic revolution." *Id.*; *see also* Thapa, *supra* note 12, at 36 (noting that as the CPN-M decided to take up arms at its Third Plenum); S.D. Muni, *The Maoist Insurgency in Nepal: Origin and Evolution* 6 (Nat'l Univ. of Sing. Inst. of S. Asian Studies, Working Paper No. 111, 2010), *available at* http://www.isas.nus.edu.sg/Attachments/PublisherAttachment/ISAS_Working_Paper_111-Email-The_Maoist_Insurgency_of_Nepal-Origin_and_Evolution_28072010180455.pdf (noting that CPN-M documents from the Third Plenum described the "strategy and tactics of armed struggle in Nepal").

16. The Forty-Point Demand of the United People's Front, Feb. 4, 1996, *reprinted in* HIMALAYAN PEOPLE'S WAR, *supra* note 7, app. A, at 285.

17. *See* Thapa, *supra* note 12, at 37 ("On 13 February 1996, the CPN (Maoist) struck in six districts. The people's war had begun."); Whitfield, *supra* note 7, at 3 ("The start of the 'people's war' waged by the Community Party of Nepal (Maoist) . . . against the Nepali state dates back to February 1996 when the government rejected a forty-point list of demands.").

merely as a small-scale domestic uprising rather than an internal conflict.[18] By 2001, a counterinsurgency unit was formed to fight the Maoists and assist the police forces.[19] Real change in the war, however, came later in 2001. In June, Crown Prince Dipendra allegedly massacred ten members of the royal family, including King Binrendra,[20] and then allegedly shot himself.[21] Gyanendra, a surviving brother of the murdered King Binrendra, assumed the throne.[22] Several months into his tenure as king and still faced with a Maoist insurgency, King Gyanedra declared a state of emergency, deployed the Royal Nepal Army ("RNA") to fight the Maoists, and introduced the Terrorist and Disruptive Activities Ordinance, which granted broad powers to the security forces to arrest people involved in "terrorist" activities.[23] The CPN-M was declared a terrorist organization.[24] From this point until the end

18. *See* Whitfield, *supra* note 7, at 4 ("The government response was confused and inadequate. As the Maoists laid plans for a protracted conflict, it addressed the insurgency as a problem of law and order."); U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS [OHCHR], CONFLICT-RELATED DISAPPEARANCES IN BARDIYA DISTRICT 20 (2008), *available at* http://www.swisspeace.ch/typo3/fileadmin/user_upload/Media/Countries/Nepal/OHCHR_ConflictRelated_Disappearances.pdf ("In the initial years of the conflict, only the police . . . had been engaged in fighting the CPN-M.").

19. *See* Whitfield, *supra* note 7, at 4 (noting that the poorly trained and equipped police force was supplemented "by a new armed police force formed specifically for the purposes of counterinsurgency"); OHCHR, *supra* note 18, at 20 (stating that in 2001, "the [Royal Nepal Army] was deployed for the first time to fight the CPN-M insurgency").

20. *See* Adams, *supra* note 9, at 126; Whitfield, *supra* note 7, at 4 (providing an account of the massacre). This dramatic event shook all of Nepal and led to various conspiracy theories about what actually happened at the palace. *See* THAPA, *supra* note 7, at 9–47 (providing a detailed account of the immediate aftermath of the massacre, the reactions of Nepalis, and the emergence of conspiracy theories); Hutt, *supra* note 7, at 7 (noting that there was suspicion that Prince Gyandenda, the king's brother, played a part in planning the massacre); Adams, *supra* note 9, at 126 (noting the same).

21. *See* Adams, *supra* note 9, at 126.

22. *See id.*; Hutt, *supra* note 7, at 7.

23. Terrorist and Disruptive Acts (Prevention and Punishment) Ordinance, 48 Nepal Gazette No. 51 (2001), *available at* http://www.nepalhomepage.com/politics/nepgaz.html; Whitfield, *supra* note 7, at 4 (noting that King Gyanendra deployed the army); ADVOCACY FORUM & HUMAN RIGHTS WATCH, WAITING FOR JUSTICE: UNPUNISHED CRIMES FROM NEPAL'S ARMED CONFLICT 9 (2008) (noting that on November 26, 2001, the state declared a nationwide state of emergency and deployed the Royal Nepal Army).

24. Terrorist and Disruptive Acts, Additional 50 Part 3, *available at* http://www.nepalhomepage.com/politics/nepgaz.html ("In exercise of the powers conferred by sub-section (3) of Section 7 of the Terrorist and Disruptive Act (Control and Punishment) Ordinance . . . His Majesty's Government has declared as terrorist the Nepal Community Party (Maoist) group . . . .").

of the war, human rights violations, committed by both the state and the Maoists, dramatically increased.[25]

In May 2002, King Gyanendra dissolved Parliament.[26] Five months later he replaced the elected government with one of his own choice and suspended upcoming elections.[27] The political situation changed little until February 2005 when King Gyanedra effectively completed his coup; he declared another state of emergency, imprisoned politicians and leaders of political parties, shut off all phone lines and internet connections, and suppressed the media.[28] He asserted that these measures were necessary responses to the Maoist insurgency, which was still waging throughout Nepal despite attempts at peace talks and ceasefires.[29]

The king's efforts to consolidate his power had an unintended consequence that ultimately destabilized his regime. The divided political parties came together and established a Seven-Party Alliance that began peace talks with the Maoists.[30]

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25. *See infra* Part I.A.5 (discussing the human rights situation during the internal conflict); *see also* ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 10 (noting that a majority of civilian deaths caused by the internal conflict occurred after the Royal Nepal Army was deployed).

26. Michael Hutt, *King Gyanendra Coup and Its Implications for Nepal's Future*, BROWN J. OF WORLD AFF., Summer/Fall 2005, at 111, 112 (2005); Whitfield, *supra* note 7, at 5 ("Parliament was dissolved in May 2002 at the recommendation of Prime Minister Deuba.").

27. *See* Adams, *supra* note 9, at 126 ("[King Gyanendra] sacked the prime minister, assumed executive authority himself, appointed his own prime minister and cabinet, and postponed elections indefinitely."); Whitfield, *supra* note 7, at 5 ("[O]n 4 October 2002 King Gyanendra dismissed the elected government, replaced it with one of his own choosing . . . and suspended the elections that had been planned for the following month.").

28. *See* Adams, *supra* note 9, at 126 ("[King Gyanendra] staged a well-planned takeover of the entire government. He cut of the country from the rest of the world, shutting down all phone lines (land and mobile), all Internet connections, and the airport. The press was given very clear instructions about what it could and could not report, with military censors installed in newsrooms. All FM radio stations . . . were directed to broadcast only entertainment."); Whitfield, *supra* note 7, at 6 ("On 1 February 2005 Gyanendra seized power in a coup, imprisoned the leaders of the political parties and civil society and declared a state of emergency."); ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 10 (noting that in February 2005, King Gyanendra "ordered the detention of thousands of political activists, journalists, and human rights monitors, and imposed severe restrictions on civil liberties").

29. *See* Whitfield, *supra* note 7, at 6 (noting that King Gyanendra cited the need to defeat the Maoists as the reason for his coup).

30. *See id.* ("In the following months, as he defied international pressure to return Nepal to a democratic process and respect the rights of his people, King Gyanendra in

From these talks, the parties concluded a twelve-point agreement in November 2005 that aimed to restore peace and democracy to Nepal.[31] These events galvanized Nepalis and led to *Jana Andolan* (People's Movement) II, which culminated in April 2006 when the people forced the king to give up his power and return power to the parliament.[32]

4. From "Peace" Onward: 2006–Present

Nepal's government and the CPN-M signed a Comprehensive Peace Agreement on November 21, 2006,[33] officially ending the ten-year conflict in Nepal and setting up an interim constitution.[34] Nearly four years after the CPA ostensibly brought peace and democracy to Nepal, both are still tenuous.

Since 2006, Nepal has had three different governments and prime ministers. The first elections for Nepal's legislative body, the Constituent Assembly ("CA"), took place in April 2008 with the CPN-M winning the largest percentage of votes.[35] In May 2008 the CA voted to abolish the monarchy and declared Nepal a secular republic.[36] On August 15, 2008 Prachanda, leader of the

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effect provided the incentive for the demoralized and divided political parties to come together into a new Seven Party Alliance . . . ."); ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 11 ("[T]he political parties represented in parliament that had established a Seven-Party Alliance (SPA) initiated a dialogue with the CPN-M with the help of India.").

31. 12-Point Understanding Reached between the Seven Political Parties and Nepal Communist Party (Maoists), Nov. 22, 2005, *available at* http://www.unmin.org.np/downloads/keydocs/12-point%20understanding-22%20Nov%202005.pdf; *see also* Whitfield, *supra* note 7, at 6.

32. *See* Whitfield, *supra* note 7, at 6; ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 11 ("On April 24 [2006], the King announced the reinstatement of the House of Representatives.").

33. Comprehensive Peace Agreement Concluded between the Government of Nepal and the Communist Party Nepal (Maoist), Nov. 21, 2006, *available at* http://www.un.org.np/node/10498 [hereinafter CPA].

34. *Id.* ¶¶ 3.2, 6.1; Whitfield, *supra* note 7, at 6 ("The CPA brought a formal end to the ten year conflict. It provided for the Maoists to enter a transitional government, and an interim constitution to be put in place, while preparations were made for elections to a constituent assembly.").

35. *Party Wise Result Status*, ELECTION COMM'N, NEPAL, (May 9, 2008), http://www.election.gov.np/reports/CAResults/reportBody.php?selectedMenu=Party%20Wise%20Results%20Status%28English%29&rand=1295486006; *see also* ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 13 (noting that the CPN-M won thirty-seven percent of the votes).

36. *See* Jai S. Singh, *From Hindu Monarchy to Secular Republic: Challenges before Nepal's Consistent Assembly*, 65 INDIA Q. 295, 309 (2009) (noting that the Constituent Assembly

CPN-M, was selected by his colleagues to become the first elected prime minister of the Federal Democratic Republic of Nepal.[37] Following disputes about the integration of former Maoist fighters into the military, Prachanda resigned as prime minister on May 4, 2009, and the CPN-M went into opposition.[38] Three weeks after Prachanda's resignation, a new government was formed, led by newly elected Prime Minister Madhav Kumar Nepal and his twenty-two-party coalition.[39] Several weeks before the May 28, 2010 deadline for writing a new constitution, Maoist protesters organized a nationwide strike and called for Prime Minister Nepal's resignation.[40] Even though the Maoists eventually called off the strike[41] and the parties agreed to extend the deadline for writing a new constitution by another year,

("CA") passed a resolution declaring Nepal "'a Secular, Federal, Democratic, Republic Nation'"); *see also* Somini Sengupta, *Nepal Poised for Rebirth as a Republic*, N.Y. TIMES, May 29, 2008, at A8.

37. *See* ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 14; *The Maobaadi Prime Minsiter*, HIMĀL SOUTHASIAN, Sept. 2008, *available at* http://www.himalmag.com/component/content/article/861-the-maobaadi-prime-minister.html (noting that Prachanda "was overwhelmingly voted in by his colleagues" to become prime minister).

38. *See Demonstration Effect: Nepal's Political Stalemate*, ECONOMIST, Sept. 19, 2009, at 54.

39. *See id.* (noting that Mr. Nepal's twenty-two party coalition was fragile); *see also Nepal: The Maosit-non-Maoist Polarisation*, HIMĀL SOUTHASIAN, June 2010, *available at* http://www.himalmag.com/component/content/article/182-nepal-the-maoist-non-maoist-polarisation.html ("[I]n May 2009, 22 out of the 25 parties in the Constituent Assembly were able to cobble together an unwiedly and inefficient coalition.").

40. Kiran Chapagain & Jim Yardley, *Nationwide Strike in Nepal Threatens Final Steps of Peace Process*, N.Y. TIMES, May 3, 2010, at A9 ("Tens of thousands of Maoist protesters in Nepal began an indefinite nationwide strike . . . paralizing much of the coutnry and demanding the resignation of the prime minister, as a deepening political impasse threatened to unravel the peace process in this Himalayan nation."); Bidushi Dhungel, *Polarised Polity*, HIMĀL SOUTHASIAN, June 2010, *available at* http://www.himalmag.com/component/content/article/48/206-polarised-polity.html ("With political consensus proving elusive, and the peace process moving at a slow crawl, matters came to a head in early May, as the Unified Communist Party of Nepal (Maoist) enforced an 'indefinite countrywide strike.' The stated intention was to pressure Prime Minsiter Madhav Kumar Nepal to resign . . . ."); *Himalayan Precipice; Nepal*, ECONOMIST, May 8, 2010, at 43 ("[O]n May 4th, tens of thousands [of Maoist protesters] formed a human chain around both sides of the 27km (17-mile) ring road, surrounding and cutting of the capital.") .

41. *See* Dhungel, *supra* note 40 ("It was only on 8 May, after six days of complete paralysis, that the party called off the blockade, caving to pressure from the international community and a countrywide public outcry at the devastating economic and social impact."); Kiran Chapagain & Jim Yardley, *Maoists End Strike in Nepal, Short of Goal of Forcing the Government to Resign*, N.Y. TIMES, May 8, 2010, at A4 ("Nepal's Maoists ended their general strike on Friday after crippling the nation for six days . . . .") .

Nepal resigned as prime minister on June 30, 2010.[42] With the legislature divided and rival leaders vying for power, it took sixteen rounds of voting—and until February 3, 2011—before Jhalanath Khanal was elected prime minister;[43] this was only after Prachanda withdrew himself as a prime minister candidate and supported Khanal.[44]

Beyond the political instability, there is concern—fueled by Maoist rhetoric that includes statements that the revolution is not yet over and continues to refer to the "people's republic"—that the Maoists are not committed to the peace process and are instead interested in one-party rule.[45] The Maoists claim this language is necessary to assuage the party cadre.[46] The youth wing of the CPN-M, known as the Young Communist League ("YCL"), is accused of continued thuggery and political intimidation throughout Nepal.[47] There are fears that the YCL

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42. Kiran Chapagain & Jim Yardley, *Nepal's Parliament Fails in 5th Try to Select Prime Minsiter*, N.Y. TIMES, Aug. 24, 2010, at A8; *Nepal: Peace, Government and Constitution*, HIMĀL SOUTHASIAN, Sept. 2010, *available at* http://www.himalmag.com/component/content/article/58/283-nepal-peace-government-and-constitution.html.

43. Kiran Chapagain & Jim Yardley, *Nepal Selects a Premier, Ending a Stalemate*, N.Y. TIMES, Feb. 4, 2011, at A10.

44. *See id.*

45. *See* Chapagain & Yardley, *supra* note 43 ("There are also stark difference between the Maoists and other parties over the constitution, with some rival politicians accusing the Moaists of trying to subvert the peace process to weaken institutions that would support a multiparty democracy."); Dhungel, *supra* note 40 (noting that the Maoists said the May 2010 nationwide strike was bring the "revolution" back and terming it "Jana Andolan 3"); Prashant Jha, *Polarised Spring*, HIMĀL SOUTHASIAN, Apr. 2009, *available at* http://www.himalmag.com/component/content/article/54/488-Polarised-spring.html ("[N]on-Maoists accuse[] the Maoists of authoritarian, if not totalitarian, ambitions and wanting to establish one-party rule); *Two Armies into One Won't Go: Nepal's Political Crisis*, ECONOMIST, May 9, 2009, at 15 ("[The Maoists] still talk (amongst themselves, at least) about a totalitarian-sounding 'people's republic.'").

46. *See How Fierce Will the Maoists Be Now?: Nepal's Political Crisis*, ECONOMIST, May 9, 2009, at 43 ("Yet Maoist leaders also hint that their virulent rhetoric is to placate their frustrated rank-and-file."); Jha, *supra* note 45 ("[The Maoists] urge interlocutors to understand that the prime minister's paper and occasional radical rhetoric about how the 'revolution is not yet over' is necessary in order to please the party cadre, who have been told that the Maoists have achieved a major political victory but are yet to see changes on the ground.").

47. *See How Fierce Will the Maoists Be Now?*, *supra* note 46 (noting the worries about the Maoist's "storm-trooping youth wing"); Harald Olav Skar, *The Red Guard of Nepal*, HIMĀL SOUTHASIAN, Sept. 2008, *available at* http://himalmag.com/component/content/article/48/860-the-red-guard-of-nepal.html (examining the Young Communist League ("YCL")); NAT'L HUMAN RIGHTS COMM'N NEPAL, SUMMARY OF THE REPORT ON THE STATUS OF HUMAN RIGHTS UNDER THE COMPREHENSIVE PEACE AGREEMENT (2007), *available at* http://www.nhrcnepal.org/publication/doc/reports/Summary%20of%

will engender other youth-driven paramilitary-like organizations in Nepal.[48] Furthermore, Nepal is plagued by general lawlessness and a lack of security, which sometimes leads ordinary people to enforce the law themselves. Various groups or villages call *bandhs* (strikes) that shut down businesses, schools, and roads.[49] Additionally, the Maoists have allegedly threatened journalists, human rights defenders, and community leaders, effectively silencing them out of fear of retaliation.[50]

5. Nepal's Human Rights Situation during and after the Internal Conflict

It is estimated that over 13,000 people, including many civilians, were killed during Nepal's internal conflict, which lasted from 1996 until 2006.[51] In the aggregate, the state was

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20the%20report%20_2_.pdf (alleging that the YCL is responsible for abductions, beatings, property seizure, and extortion).

48. *See* Skar, *supra* note 47 ("One way or another, the strength and pervasiveness of the YCL in almost all civil-society affairs has become a national issue, especially as it engenders copycat organisations in the other parties."). *See generally* Harald Olav Skar, *Between Boy Scouts and Paramilitary Storm Troops: The Young Communist League of Nepal* (Norwegian Inst. of Int'l Aff., Working Paper No. 739, 2008) (providing a history of Nepal's YCL and other YCLs).

49. *See* Kanak Mani Dixit, *State of the Maoist State*, HIMĀL SOUTHASIAN, May 2009, *available at* http://himalmag.com/component/content/article/77/730-State-of-the-Maoist-state.html (arguing that the absence of government leads to the inability to control *bandhs*); *False Start: Nepal's Fragile New Government*, ECONOMIST, June 20, 2009, at 41 (noting how the YCL essentially closed Kathmandu when it called a *bandh* after it accused the Unified Marxist-Leninist youth faction of murdering one its leaders); Joshua Gross, *Dark Side of Democracy: Chaos and Anarchy Set Loose in Post-Conflict Nepal*, GLOBALPOST, Oct. 20, 2009, http://www.globalpost.com/dispatch/study-abroad/091019/dark-side-democracy ("A bandh—from the Hindi word for 'closed'—can spark from a strike over wages, a political party sending a message or a village demanding restitution in the aftermath of an auto accident."); *see also supra* note 40 (discussing the May 2010 nationwide strike called by the Maoists).

50. Dixit, *supra* note 49 ("A culture of silence is taking over . . . as Maoists and former-Maoists goons throttle journalists, human rights defenders, community leaders, and local politicians."); Jha, *supra* note 45 (noting that violent incidents have created a "culture of silence").

51. ADVOCACY FORUM & HUMAN RIGHTS WATCH, *supra* note 23, at 3; HUMAN RIGHTS WATCH, *Nepal's Civil War: The Conflict Resumes* (Briefing Paper 2005), *available at* http://www.hrw.org/legacy/english/docs/2006/03/28/nepal13078_txt.htm [hereinafter HUMAN RIGHTS WATCH, *The Conflict Resumes*] (noting that the Informal Sector Service Center recorded over 8000 mostly civilian deaths since November 2001); *Number of Victims Killed by State and Maoist in Connection with the "People's War" 13 Feb 1996–31 Dec 2006*, INFORMAL SECTOR SERV. CTR. [INSEC], http://www.insec.org.np/pics/1247467500.pdf (calculating that a total of 13,347 people were killed from February 13, 1996 until December 31, 2006). Nepal's estimated population in July 2010

responsible for almost double the number of killings committed by the Maoists, but both were responsible for the deaths of thousands of people.[52] Both sides also commonly practiced enforced disappearances.[53] From 2003 to 2004, Nepal recorded the highest number of new cases of enforced disappearances in the world.[54] In total, approximately 1700 enforced disappearances were reported during the conflict, of which about 1300 were allegedly committed by the state and its security forces.[55]

Another widely practiced human rights violation was the torture of detainees. Nepal's National Human Rights Commission reported in 2003 that nearly seventy percent of people arrested by state authorities were likely to be tortured.[56]

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was just under 29,000,000. CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 2010, at 452 (2010).

52. *See* INSEC, *supra* note 51 (reporting that the state killed 8377 people and the Maoists killed 4970 people).

53. An enforced disappearance is

> considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by the concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, art. 2, U.N. Doc. A/RES/61/177 (Jan. 12, 2007) [hereinafter Disappearance Convention]; *see also* Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, art. 1(2), U.N. Doc. A/RES/47/133 (Dec. 18, 1992) ("[An enforced disappearance] constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.").

54. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Enforced or Involuntary Disappearances, *Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions: Question of Enforced or Involuntary Disappearances*, ¶ 227, U.N. Doc. E/CN.4/2004/58 (Jan. 21, 2004); *see also* HUMAN RIGHTS WATCH, CLEAR CULPABILITY: "DISAPPEARANCES" BY SECURITY FORCES IN NEPAL 24 (2005) [hereinafter HUMAN RIGHTS WATCH, CLEAR CULPABILITY] (noting that the number of disappearances rose dramatically during the state of emergency and increased even more after the breakdown of a ceasefire in August 2003).

55. *See* HUMAN RIGHTS WATCH, CLEAR CULPABILITY, *supra* note 54, at 29 (noting that in most disappearances documented by Human Rights Watch, the person disappeared was last seen in the custody of government security forces); HUMAN RIGHTS WATCH, *The Conflict Resumes*, *supra* note 51.

56. *See* NAT'L HUMAN RIGHTS COMM'N NEPAL, HUMAN RIGHTS IN NEPAL: A STATUS REPORT 2003, at 35 (2003).

Despite having fewer claims of torture leveled against them, the Maoists faced similar allegations.[57] Common methods of torture in Nepal include, inter alia, beating the soles of the feet, administering electric shocks, burning cigarettes on the victim, depriving the victim of food and drink, and blindfolding.[58] Finally, the Maoists were also accused of using, and sometimes forcibly recruiting, children for military purposes. In 2003, the Asian Human Rights Commission estimated that children composed up to thirty percent of the Maoist forces.[59]

Despite some improvement in the human rights situation since the end of the internal conflict, many human rights violations continue. In July 2007, Nepal's National Human Rights Commission ("Commission") reported that there was little improvement in the human rights situation since February 2007.[60] From February 2007 until July 2007, the Commission received 726 complaints, which included 141 related to abduction and disappearance, 140 related to torture and mistreatment, and 102 related to killings.[61] In its 2008–2009 annual report, which includes data from July 2007 to June 2008, the Commission listed 127 complaints for abduction, 127 for disappearance, 163 for torture, and 249 for killings.[62] While the numbers suggest that fewer human rights violations have occurred since the signing of the CPA than during the internal conflict, violations still continue at alarming rates.

Nepal's recent history, including the continuation of human rights violations and threats to peace and democracy after the signing of the CPA, exemplifies the challenges that transitional governments need to overcome. The next Section explores some

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57. *See id.* at 36 ("As for the Maoists, while their numbers are quite low . . . compared to the number of the State authorities, the victims of torture by Maoists increased to an overwhelming 180 in the year 2002.").

58. *See id.*

59. *Children and the People's War in Nepal: 146 Children Killed, 2000 Orphaned, 4000 Recruited and 4000 Homeless*, ASIAN HUMAN RIGHTS COMM'N, (Jan. 22, 2003), http://acr.hrschool.org/mainfile.php/0111/55.

60. *See* NAT'L HUMAN RIGHTS COMM'N NEPAL, *supra* note 47 (finding that killings, abductions, beatings, and other human rights violations continued to occur throughout Nepal).

61. *See id.*

62. *See* NAT'L HUMAN RIGHTS COMM'N NEPAL, ANNUAL PROGRESS REPORT JULY 2007–JUNE 2008, at 11 (2008).

of the established mechanisms transitional states can implement to deal with their troubled pasts.

B. *Transitional Justice*

Transitional justice refers to the processes and mechanisms by which a society in transition addresses past large-scale human rights violations in order to lay a foundation for sustained peace, democracy, and justice.[63] A society in transition is usually one going from conflict or authoritarian rule (during which human rights violations occurred) to the ultimate goals of establishing and strengthening peace or democracy.[64]

Transitional justice has its roots in the prosecutions of Nazi war criminals at the Nuremberg trials following World War II.[65] It was not until the 1970s, however, that scholars began paying more attention to transitional justice, in part because of the large

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63. *See* U.N. Secretary-General, *General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) (defining transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"); Louis Bickford, *Transitional Justice*, *in* 3 THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1045 (Dinah Shelton ed., 2004) (noting that societies use transitional-justice activities "in order to build a more democratic, just, or peaceful future"); Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 768 (2004) (noting that a transition must be "consistent with . . . democratic commitments"); Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 2 (Naomi Roth-Arriaza & Javier Mariezcurrena eds., 2006) (noting that transitional justice practices follow a period of conflict, civil strife or repression).

64. *See* Bickford, *supra* note 63, at 1046 (noting that transition "refers to a major political transformation, such as regime change from authoritarian or repressive rule to democratic or electoral rule or a transition from conflict to peace or stability"); Eirin Mobekk, *Transitional Justice in Post-Conflict Societies—Approaches to Reconciliation*, *in* AFTER INTERVENTION: PUBLIC SECURITY MANAGEMENT IN POST-CONFLICT SOCIETIES: FROM INTERVENTION TO SUSTAINABLE LOCAL OWNERSHIP 261, 261 (Anja H. Ebnöther & Philipp H. Fluri eds., 2005) ("Transitional justice mechanisms are created to deal with crimes that were committed during a conflict period, at a stage where that society is at the cusp of a transition from a society of conflict to one of democracy and peace.").

65. *See* TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 3 (2010); Bickford, *supra* note 63, at 1046; *see also* David M. Crane, "Back to the Future"—Reflections on the Beginning of the Beginning: International Criminal Law in the Twenty-First Century, Address at the Fordham International Law Journal Symposium: Transitional Justice: War Crimes Tribunals and Establishing the Rule of Law in Post-Conflict Countries, *in* 32 FORDHAM INT'L L.J. 1761, 1765 (2009) ("The jurisprudence considered at Nuremberg has been realized and has expanded to address the myriad of issues facing the atrocities of today and the future.").

number of transitioning states that employed transitional justice mechanisms.[66] That parties have used these mechanisms in such diverse geographical, cultural, and religious settings demonstrates that the mechanisms must be flexible in order to address the specific context, needs, and limitations of each transitioning society.[67] This Section examines the general goals and three main mechanisms of transitional justice—truth commissions, prosecutions, and reparations—and concludes by identifying the goals of transitional justice that Nepalis have determined to be the most important.

1. Goals of Transitional Justice

Despite the nuances of each situation, there are common goals that characterize transitional justice. One set of goals is backward-looking[68] and includes achieving justice for victims and society through accountability and, sometimes, punishment. Justice is based on ethical and societal norms that suggest crimes should not go unpunished and that perpetrators, including the state itself, should be held accountable for their illegal actions.[69]

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66. *See* Bickford, *supra* note 63, at 1046 ("[T]he transitional justice framework gained coherence in the last two-and-a-half decades of the twentieth century, especially beginning with the trials of the former members of the military juntas in Greece (1975) and Argentina (1983) . . . ."). *See generally* David Backer, *Cross-National Comparative Analysis, in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 23, 25–26 (Hugo van der Merwe et al. eds., 2009) (listing states in political transition from 1974–2008 that could "permit or induce increased scrutiny of past injustices"). Well-known early examples of transitioning states include Greece (1974) and Argentina (1983); more recent examples include Chile (1990), El Salvador (1992), South Africa (1994), and Liberia (2003). *See* Backer, *supra*, at 25–26.

67. *See* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 46 (2002) ("Transitional justice must reflect the needs, desires, and political realities of the victimized society . . . ."); David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43, 44, 63 (1999); Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation, in* THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE 21, 22 (Alice H. Henkin ed., 2002) ("Every national case has unique historical and cultural qualities and must select and adapt models that are most appropriate to its circumstances . . . .").

68. *See* Posner & Vermeule, *supra* note 63, at 766 (stating that scholars generally see transitional justice as backward-looking in that it seeks to punish wrong-doers, compensate victims, and reveal the truth about the past).

69. *See* Aukerman, *supra* note 67, at 53–57 (exploring approaches to punishment); Crocker, *supra* note 67, at 53 ("Ethically defensible treatment of past wrongs requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment.").

When achieved through holding perpetrators accountable, justice can also deter and prevent future crimes by demonstrating to would-be violators that their actions will not go unpunished.[70] If paired with reparations, justice attempts to return victims to their pre-injury state.[71] Another backward-looking goal is uncovering and exposing the truth about what human rights violations occurred and by and against whom they were committed. When publicly disseminated, the truth empowers and provides closure to victims and creates an accurate record of the past.[72] It can also prevent a recurrence of violations.[73] Some scholars argue that without the truth component, no other goals of transitional justice can be realized.[74]

Justice and truth, the backward-looking goals of transitional justice, are the foundation on which the forward-looking, longer-term goals are built—and include creating sustainable peace and fostering democracy.[75] Key to obtaining these goals is establishing a clear demarcation between the pre-transition and the transitioning/post-transition regime.[76] To separate itself from its predecessor, some argue that the new government must combat impunity and promote respect for the rule of law.[77] The new

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70. *See* Aukerman, *supra* note 67, at 63 (exploring the concept of deterrence).

71. *See id.* at 77 (noting that a purpose of restorative justice is to "repair injuries to victims"); Crocker, *supra* note 67, at 57 ("One way of reckoning with past wrongs is by "righting" them—by restoring victims to something approaching their status quo ante.").

72. *See* Crocker, *supra* note 67, at 49 ("To meet the challenge of reckoning with past atrocities, a society should investigate, establish, and publicly disseminate the truth about them."); Roht-Arriaza, *supra* note 63, at 4 (arguing that "closure" is important for both individual victims and "whole traumatized societies"); *see also infra* notes 91–92 and accompanying text (explaining how truth commissions can foster empathy and a shared sense of history, and empower victims).

73. Indep. Expert to Update the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, *Rep. of the Indep. Expert to Update the Set of Principles to Combat Impunity*, Human Rights Comm'n, at 7, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (by Diane Orentlicher) [hereinafter *Principles to Combat Impunity*] ("Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.").

74. *See* Crocker, *supra* note 67, at 50.

75. *See* Bickford, *supra* note 63, at 1045 (suggesting that the purpose of transitional justice activities is "to build a more democratic, just, or peaceful future"); *see also* Posner & Vermeule, *supra* note 63, at 766.

76. *See* Posner & Vermeule, *supra* note 63, at 765 ("Every transition creates a divide between the old regime and the new regime.").

77. *See* Crocker, *supra* note 67, at 56 ("Rule of law is especially important in a new and fragile democracy bent on distinguishing itself from prior authoritarianism,

government must reform or create state institutions and remove perpetrators of human rights violations from positions of power.[78] The state must also take proactive steps to prevent future turmoil, including promoting reconciliation between the parties involved in the previous conflict or between certain parties that are likely to engage in future conflict.[79] In combination, these steps are necessary to prevent human rights violations from occurring again and to allow peace and democracy to take root.

How a transitioning society prioritizes these goals will depend on which societal actors (e.g., government, nongovernmental organizations, international bodies) make the decisions, as well as on factors including culture, history, and religion.[80]

2. The Mechanisms of Transitional Justice

To achieve the objectives of transitional justice, states can employ several different mechanisms. While an in-depth analysis of these mechanisms is beyond the scope of this work, an introduction to each is necessary to understand the components

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institutionalized bias, or the 'rule of the gun.'"). *See generally* U.N. Secretary-General, *supra* note 63, ¶ 6 ("[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.").

78. *See* Crocker, *supra* note 67, at 59 (arguing that a society cannot make a sustainable transition unless it reforms basic institutions, including "the judiciary, police, military, land tenure system, tax system, and the structure of economic opportunities").

79. *See* Mobekk, *supra* note 64, at 262–64 (arguing that "reconciliation is the ultimate objective in all post-conflict societies" and discussing the difference between national and individual reconciliation); Crocker, *supra* note 67, at 60 (discussing different meanings of reconciliation, such as simple coexistence, respect among adversaries, forgiveness, mercy, mutual healing, and harmony).

80. *See* Aukerman, *supra* note 67, at 93 (noting that religion will affect the choices a society makes about transitional justice); Crocker, *supra* note 67, at 47 ("To fashion and evaluate any particular tool to reckon with past evil in a particular society and to combine it with other tools requires not only knowledge of that society's historical legacies and current capabilities but also a grasp of morally important goals and standards of assessment."); Kritz, *supra* note 67, at 22.

of a comprehensive transitional justice program. This Section focuses on truth commissions, prosecutions, and reparations.

a. Truth Commissions

Truth commissions aim to uncover the facts about injustices under a prior regime and are directly linked to the goal of truth.[81] Since the 1970s, dozens of truth commissions have been established in states all over the world.[82]

Truth commissions are independent investigative bodies charged with establishing a record of the past, with a particular emphasis on human rights violations, that (1) is impartial and accurate[83] and (2) reconciles competing views of the past that might perpetuate conflict between various societal groups.[84] Created either by a branch of the government or by the signing of a peace agreement,[85] these commissions are temporary.[86] A mandate determines the commission's methods of operation, as well as the specific violations and time period under investigation; the focus is on general truth, which concerns the

81. *See supra* notes 72–74 (explaining how truth is a foundational, backward-looking goal of transitional justice).

82. *See* Backer, *supra* note 66, at 35–38 (listing fifty-eight truth commissions following political transitions from 1977; the list excludes some commissions such as "intergovernmental inquiries that have a narrow focus and operational mandate or are initiated without local approval or involvement" and truth commissions operating in established democracies); U.N. Secretary-General, *supra* note 63, ¶ 50 (noting that more than thirty truth commissions have been established, but not indicating a date from which this statistic is measured).

83. *See* Mark Freeman & Priscilla B. Hayner, *Truth-Telling, in* RECONCILIATION AFTER VIOLENT CONFLICT 122, 125 (David Bloomfield et al. eds., 2003) ("[Truth commissions] can establish a record of the past that is accurate, detailed, impartial and official."); Kritz, *supra* note 67, at 41 (noting that truth commissions are officially sanctioned); Mobekk, *supra* note 64, at 267 ("[Truth commissions] are established and given authority by the local governments or international organisations . . . .").

84. Kritz, *supra* note 67, at 37 (noting that in some places, as was the case in Bosnia, multiple truths might exist after a conflict).

85. *See* Freeman & Hayner, *supra* note 83, at 129; *see also* CPA, *supra* note 33, ¶ 5.2.5 ("Both sides agree to set up with mutual consent a High-level Truth and Reconciliation Commission in order to probe into those involved in serious violation of human rights and crime against humanity in course of the armed conflict for creating an atmosphere for reconciliations in the society."); *cf.* Mobekk, *supra* note 64, at 267 (adding that in some instances truth commissions are established by international organizations).

86. *See* Freeman & Hayner, *supra* note 83, at 125 (noting that truth commissions usually operate for only one or two years); U.N. Secretary-General, *supra* note 63, ¶ 50.

whole of society, as opposed to truth for specific individuals.[87] Some truth commissions focus on all human rights violations during a particular time period, while others focus on specific types of human rights violations.[88]

A critical element of truth commissions is that they are nonjudicial, which means that they cannot determine culpability, punish perpetrators, or have their recommendations enforced.[89] Despite these limitations, truth commissions can support the work of prosecutions, if prosecutions are part of the transitional justice program, by gathering evidence and collecting witness testimony.[90]

In addition to deciphering and exposing the truth and, in some circumstances, supporting prosecutions, truth commissions can also advance the goal of national reconciliation. The truth commission process fosters empathy and a sense of shared history by providing an avenue to disclose the suffering borne by individuals on both sides of a conflict.[91] Similarly, by allowing them a space in which to share their stories, truth commissions can empower and strengthen victims.[92]

Truth commissions differ in their outcomes and success. While most have issued final reports (with varying degrees of

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87. *See* Freeman & Hayner, *supra* note 83, at 122, 125 (arguing that truth commissions are more useful for national or political reconciliation than for individual reconciliation); Mobekk, *supra* note 64, at 266 ("[B]ecause a truth commission tracks the overall general pattern of human rights abuse . . . , the focus and outcome is more that of national reconciliation.").

88. *See* Backer, *supra* note 66, at 35–38 (identifying the focus of inquiry of various truth commissions since 1977).

89. *See* Freeman & Hayner, *supra* note 83, at 123 ("[Truth commissions] have no power to put anyone in prison, they cannot enforce their recommendations and most have not even had the power to compel anyone to come forward to answer questions."); Mobekk, *supra* note 64, at 267 ("A truth commission cannot determine culpability of the individual, and it cannot punish or sanction perpetrators of human rights abuses.").

90. *See* Freeman & Hayner, *supra* note 83, at 125; Kritz, *supra* note 67, at 43 (explaining that trials for crimes against humanity require evidence that these acts were widespread and systematic and that truth commissions, because of their extensive work, can be useful in showing such trends).

91. *See* Freeman & Hayner, *supra* note 83, at 126 (noting that tolerance and understanding can come from hearing about others' grievances and suffering); *see also* Mobekk, *supra* note 64, at 266 ("Reconciliation, as truth, is central to truth commissions.").

92. *See* Freeman & Hayner, *supra* note 83, at 134 (noting that public hearings of victim testimony can lead to formal acknowledgment of past wrongs and an understanding and sympathy for the victim).

effectiveness, as measured by the implementation of their recommendations[93]), a few have prematurely disbanded.[94] Despite this mixed record, states continue to use them during—and after—their transitions.[95]

b. Prosecutions

A second mechanism used in transitional justice is prosecutions.[96] Prosecuting perpetrators of human rights violations allows a new government to demonstrate commitment to the rule of law and a desire to counter the culture of impunity, both of which promote public confidence in the state's willingness to enforce the law and may also increase the judiciary's credibility.[97] To demonstrate a distinction from the previous regime—which presumably allowed human rights violations to go unpunished—and to be effective, meaningful, and legitimate, the state must uphold standards of due process in its prosecutions.[98] Legitimizing justice through state mechanisms is also likely to mitigate the chances of vigilante justice; when victims and aggrieved groups believe that the state is committed to achieving justice, they are less likely to seek justice by their

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93. *See id.* at 137 ("[T]he implementation of recommendations has frequently been a major shortcoming for truth commissions . . . .").

94. *See* Backer, *supra* note 66, at 35–38 (listing the outcomes of various truth commissions from 1977 until 2007).

95. *See* Freeman & Hayner, *supra* note 83, at 138 (noting the skepticism of truth commissions' universal application, but also highlighting contributions made by past truth commissions).

96. *See* CPA, *supra* note 33, ¶ 7.1.3 ("Both sides express their commitment that impartial investigation shall be carried out and lawful action would be taken against individuals responsible for obstructions in the exerciese of the rights contained in the agreement and guarantee not to encourage impunity.").

97. *See* U.N. Secretary-General, *supra* note 63, ¶ 39 ("Criminal trials can also contribute to greater public confidence in the State's ability and willingness to enforce the law."); Kritz, *supra* note 67, at 25 (arguing that trials replace a culture of impunity with a culture of accountability and "provide an important opportunity to establish the credibility of a previously compromised or non-functioning judicial system"); Mobekk, *supra* note 64, at 277 (arguing that not holding perpetrators accountable signals "that impunity and not the rule of law reigns"); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991) (arguing that trials can inspire societies to affirm the principle of the rule of law); *see also supra* note 77 and accompanying text (noting that in order for the forward-looking goals of transitional justice to be realized, the new government must combat impunity and promote respect for the rule of law).

98. *See* Aukerman, *supra* note 67, at 48–49 ("[I]f prosecutions are undertaken, they must comport with accepted standards of due process.").

own means.[99] Finally, prosecutions are important for societal reconciliation,[100] and they are especially critical for individual victims for whom prosecutions provide justice, security, and an opportunity to assert their dignity.[101]

In the transitional justice context, prosecutions face unique limitations. The judicial infrastructure of societies in transition may be weakened, underdeveloped, or nonexistent.[102] Exacerbating the problems posed by a weak judicial system is the likelihood that the number of perpetrators facing trial would overwhelm even a well-functioning judiciary.[103] Prosecutions by a regime that recently gained power can be perceived by some as politically motivated or unfair if they are directed at only opposition parties or if the governing regime fails to investigate itself.[104] When prosecutions are pursued, they have the potential to destabilize a society hanging onto a tenuous peace.[105] Given this critical concern, transitional governments must strategically plan prosecution programs, taking into account difficult

99. *See* Kritz, *supra* note 67, at 25 ("[Trials] provide some redress for the suffering of victims and help to curtail the inclination towards vigilante justice."); Posner & Vermeule, *supra* note 63, at 792 ("Thus, retroactive justice fulfills the standard channeling function of legal punishment, which substitutes public and official process for vigilantism.").

100. *See* Mobekk, *supra* note 64, at 270 (suggesting that prosecutions, when used in conjunction with other transitional justice mechanisms, "will have a greater probability of achieving the rather large objective of reconciliation, at both the national and individual levels").

101. *See* U.N. Secretary-General, *supra* note 63, ¶ 39 (arguing that prosecutions can help victims reclaim their dignity); Kritz, *supra* note 67, at 25 (noting that trials give a sense of security to victims); Orentlicher, *supra* note 97, at 2542 (arguing that trials can inspire societies to reassert respect for the inherent dignity of individuals).

102. *See* Kritz, *supra* note 67, at 35 ("The criminal justice system of every country emerging from a pattern of mass abuses is compromised and minimally functional, with severely limited capacity at best."); Orentlicher, *supra* note 97, at 2596 ("Even a well-functioning judicial system would be incapable [of prosecuting all those who are criminally responsible]; much less can this be expected following the wholesale collapse of judicial process.").

103. *See* Aukerman, *supra* note 67, at 51 (noting that entire societies can be implicated in atrocities); Kritz, *supra* note 67, at 35 ("A systematic pattern of atrocity and trampling of fundamental rights potentially implicates everyone involved in the system, however tangentially.").

104. *See* Orentlicher, *supra* note 97, at 2596–97 (discussing how Argentina ultimately granted amnesty to some members of the military out of concerns of political instability).

105. *See* Kritz, *supra* note 67, at 35 ("Attempting to prosecute or purge all those implicated would be politically destabilizing, economically devastating and logistically impossible.").

decisions about whom to prosecute with potentially limited funds and evidence, and acknowledging the likelihood that it may be impossible to prosecute all perpetrators.[106] Some may see such a strategic approach as unacceptable or as compromising the goal of providing justice to all victims, but it may be inevitable because of the limitations.

In part because of these challenges, multiple prosecution models have emerged in the transitional justice context, including local, international, or hybrid (using both local and international elements) trials, and universal jurisdiction. These different models can be used exclusively or in combination. Research suggests that criminal prosecutions in transitional societies occur most often in domestic courts.[107] When possible, local trials are preferred because they can help bolster the legitimacy of the judiciary and provide a sense of local ownership to the process.[108] In limited cases, when domestic courts have been unable or unwilling to prosecute perpetrators, international or hybrid courts have been created.[109] International courts include the International Criminal Court ("ICC") and the two ad hoc tribunals of the International Criminal Court for the Former Yugoslavia ("ICTY") and the International Criminal Court for Rwanda ("ICTR") created by the Security Council of the United Nations ("UN") as subsidiary organs.[110] Some states have

106. *See* U.N. Secretary-General, *supra* note 63, ¶ 46 (arguing that because the vast majority of perpetrators will never be tried, the prosecutorial policy must be strategic); Aukerman, *supra* note 67, at 53 (suggesting that selective prosecutions in the transitional justice context is inevitable); Kritz, *supra* note 67, at 35 (arguing that societies faced with a large number of perpetrators are obligated to make choices and establish levels of culpability); Orentlicher, *supra* note 97, at 2598, 2602–03 ("[P]rosecutions by a transitional government that focused on those most responsible for designing and implementing a past system of rights violations or on the most notorious crimes would best comport with common standards of justice.").

107. *See* Backer, *supra* note 66, at 28–32.

108. *See* U.N. Secretary-General, *supra* note 63, ¶ 40 ("Of course, domestic justice systems should be the first resort in pursuit of accountability."); Crane, *supra* note 65, at 1768 ("Justice must be done, first, domestically."); Kritz, *supra* note 67, at 28 ("If the goal . . . is the creation of a stable society that can avoid the recurrence of massive violations, then a robust and credible system of justice is essential.").

109. *See* OHCHR-NEPAL, *What is Transitional Justice?*, (Apr. 12, 2007), http://nepal.ohchr.org/en/resources/publications/TJ%20brochure_E.pdf (arguing that international or hybrid courts "should only be considered if domestic courts are unable or unwilling to conduct effective investigations or prosecutions").

110. *See* U.N. Secretary-General, *supra* note 63, ¶ 38 (noting that the ITCY and the ICTR were established by the Security Council); Backer, *supra* note 66, at 28 (noting that

combined international and domestic elements to create hybrid tribunals such as the Extraordinary Chambers in the Courts of Cambodia and the Special Panels for Serious Crimes in Timor-Leste.[111] A final model of prosecution is universal jurisdiction, by which a third-party state prosecutes, in its own domestic courts, perpetrators of a limited number of the most severe human rights violations based upon the principles that some crimes are so grave that they affect the international community and that every state has an interest in prosecuting them.[112]

c. Reparations

A final mechanism used in transitional justice is reparations.[113] The primary purpose of reparations is for the state to redress and "right" the wrongs committed—and, where possible, to return the victim to the status quo ante.[114] There are five categories of reparations.

The first is restitution, which aims to restore victims to their original situation before the violation of their rights.[115] Examples

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two ad hoc UN tribunals—Yugoslavia and Rwanda—have been operating since the mid-1990s).

111. *See* U.N. Secretary-General, *supra* note 63, ¶ 38 (noting that the United Nations has established or contributed to the establishment of various criminal tribunals, of a variety of institutional models, including mixed tribunals in Bosnia and Herzegovina, Cambodia, and Sierra Leone; a panel in Timor-Leste; the use of international judges and prosecutors in Kosovo; and an investigatory commission in Guatemala); Backer, *supra* note 66, at 28–32.

112. *See* U.N. Secretary-General, *supra* note 63, ¶ 48 ("[T]he universality principle . . . holds that some crimes are so grave that all countries have an interest in prosecuting them."); Backer, *supra* note 66, at 32 (noting that at least a dozen countries have initiated prosecutions for violations committed elsewhere); Kritz, *supra* note 67, at 29–30 (noting that universal jurisdiction is used for such crimes as genocide, war crimes, crimes against humanity, torture, disappearances, and terrorism).

113. *See* Backer, *supra* note 66, at 41 (listing reparation measures by country).

114. *See* Crocker, *supra* note 67, at 57 ("One way of reckoning with past wrongs is by 'righting' them—by restoring victims to something approaching their status quo ante."); Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451, 452 (Pablo de Greiff ed., 2006) (noting that "reparations" is a term "used in a wide sense to refer to all those measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes").

115. *See* 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, G.A. Res. 60/147, ¶ 19, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles] ("Restitution should, whenever possible, restore the victim to the original situation before the gross violations

of restitution include restoration of liberty and citizenship, return of property, and reinstatement of employment.[116] The second category is compensation, which is provided for harms that can be quantified in economic terms.[117] Such harms might include physical, mental, or moral injury; lost opportunity and lost earnings; and costs for medical, psychological, legal, or social services.[118] Rehabilitation is the third category of reparations and includes measures to provide medical, psychological, legal, or social services.[119] The fourth category is satisfaction, which can include the cessation of violence; determinations and disclosure of the truth concerning past human rights violations; the search for the disappeared, abducted, or killed; a declaration restoring dignity, reputation, and rights to victims; public apology and acknowledgement of responsibility; sanctions against perpetrators; commemorations of the victims, especially in the form of memorials; and incorporation of human rights training into education systems.[120] The fifth category of reparations is guarantees of nonrepetition, which are aimed at preventing the reoccurrence of human rights violations and conflict.[121] Many of these guarantees function as institutional reforms. They can include civilian control of the military and security forces; compliance with international standards of due process for civilian and military proceedings; establishment of an independent judiciary; protection of legal and medical

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of human rights law or serious violations of international humanitarian law occurred."); *see also* de Greiff, *supra* note 114, at 452.

116. *See* Basic Principles, *supra* note 115, ¶ 19; *see also* de Greiff, *supra* note 114, at 452.

117. *See* Basic Principles, *supra* note 115, ¶ 20 ("Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law . . . ."); *see also* Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier, in* THE HANDBOOK OF REPARATIONS, *supra* note 114, at 478, 483 (suggesting that compensation rests on the fungibility between money and harm suffered); de Greiff, *supra* note 114, at 452.

118. *See* Basic Principles, *supra* note 115, ¶ 20; *see also* de Greiff, *supra* note 114, at 452.

119. *See* Basic Principles, *supra* note 115, ¶ 21; *see also* de Greiff, *supra* note 114, at 452.

120. *See* Basic Principles, *supra* note 115, ¶ 22; *see also* de Greiff, *supra* note 114, at 452.

121. *See* Basic Principles, *supra* note 115, ¶ 23; *see also* de Greiff, *supra* note 114, at 452.

professionals and human rights defenders; provision of human rights education; observance of codes of conduct and ethical norms for professionals; promotion of conflict resolution; and review and reform of state laws to ensure compliance with international human rights and humanitarian law.[122]

Transitional justice has numerous goals and a diverse range of mechanisms, but which goals are prioritized and which mechanisms have the potential to be most effective are context and society specific. Examining how Nepalis evaluate their post-conflict situation and goals for the future is useful for considering ways to plan a transitional justice program in Nepal.

3. Transitional Justice and Nepal

There is limited field research on Nepalis' views towards transitional justice, but a survey conducted by Advocacy Forum, a well-regarded Nepali human rights organization, and the International Center for Transitional Justice, provides some valuable insight.[123] While not dispositive, it is still illustrative.

As an introductory question to the survey, respondents were asked to provide a definition of justice. The top five answers were (1) access to justice, (2) prosecution of perpetrators, (3) compensation, (4) fulfillment of victims' demands, and (5) finding out the truth about incidents of abuse.[124] When asked what should be done to achieve a sustainable peace in Nepal, the most chosen answer (26.8%) was promoting coexistence and reconciliation.[125] Other relevant answers include providing reparations (4.0%), prosecuting perpetrators (3.5%), and improving justice (2.3%).[126]

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122. *See* sources cited *supra* note 121.

123. NEPALI VOICES: PERCEPTIONS OF TRUTH, JUSTICE, RECONCILIATION, REPARATIONS AND THE TRANSITION IN NEPAL is a survey and report jointly conducted and published by the International Center for Transitional Justice and Advocacy Forum, a leading Nepali human rights organization. *See generally* INT'L CTR. FOR TRANSITIONAL JUSTICE & ADVOCACY FORUM, NEPALI VOICES: PERCEPTIONS OF TRUTH, JUSTICE, RECONCILIATION, REPARATIONS AND THE TRANSITION IN NEPAL (2008) [hereinafter NEPALI VOICES]. The report compiled responses of surveys given to 811 Nepalis. The sample set came from seventeen of Nepal's seventy-five districts—representing a diverse mix of genders, occupations, education levels, religions, castes, and ethnics groups. *Id.* at iv.

124. *Id.* at 26.

125. *Id.* at 29.

126. *Id.*

Respondents were also asked about the mechanisms of transitional justice. Regarding the primary goal of truth commissions, finding the truth about the past and providing justice to victims were the top answers.[127] The second and third most popular answers were providing compensation to victims and prosecuting persons responsible for human rights violations, respectively.[128]

On prosecutions, a majority (69%) supported holding domestic trials, while a minority (13%) wanted international trials.[129] Despite the support for domestic trials, over half agreed or strongly agreed that Nepal's current laws were inadequate for trials of serious human rights violations.[130]

Almost every respondent (99%) thought that victims should receive reparations and most (77%) agreed that the state was the primary entity responsible for providing reparations.[131] Most (68%) favored reparations to individuals, but a healthy number (28%) favored community reparations.[132] When asked to prioritize compensation and prosecutions, 54% either agreed or strongly agreed that compensation was more important than trials.[133]

The survey confirms that Nepalis are interested in fulfilling the backward-looking goals of transitional justice: truth and justice. Additionally, while Nepalis recognize a need for truth commissions, prosecutions, and reparations, there seems to be broad agreement that victims of human rights violations should receive reparations. The international law of remedy provides a framework around which a reparations program can be built.

C. *The International Law of Remedy*

One way to realize the goals of transitional justice is to provide a remedy for the victims of human rights violations. Where those violations were committed by the state or state

127. *Id.* at 33 (noting that each top answer received 19% of the responses).

128. *Id.* (noting that 16% answered with compensation and 8% with prosecutions).

129. *Id.* at 38.

130. *Id.* at 39 (noting that 40% agreed and 16% strongly agreed that current Nepali laws were inadequate for trials of serious human rights violations).

131. *Id.* at 45–46.

132. *Id.* at 46.

133. *Id.* at 39 (noting that 40% agreed and 14% strongly agreed that compensation was more important than trials).

actors, victims will often look to the state for a remedy. But "remedy" is a broad and vague term. This Section provides a survey of relevant, contemporary international law concerning the right to remedy, reparations, and compensation, as espoused in international and regional instruments and jurisprudence, and United Nation documents.

1. The Right to Effective Remedy in International and Regional Instruments

Several international instruments recognize the right to remedy for human rights violations. The Universal Declaration of Human Rights states that "[e]veryone has the right to an *effective remedy* by the competent national tribunals for acts violating the fundamental rights."[134] The International Covenant on Civil and Political Rights ("ICCPR") states that "[e]ach State Party to the present Covenant undertakes (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy.*"[135] The International Convention on the Elimination of All Forms of Racial Discrimination provides that "[s]tate Parties shall assure to everyone within their jurisdiction *effective protection and remedies,* through the competent national tribunals and other State institutions, against any acts of racial discrimination."[136] The Declaration on the Protection of All Persons from Enforced Disappearances, which is a nonbinding resolution of the UN General Assembly, declares that "[t]he right to a prompt and *effective judicial remedy* as a means of

134. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (emphasis added).

135. International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. Treaty Doc. No. 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (emphasis added). The Human Rights Committee has clarified that "the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article." Human Rights Comm., General Comment No. 3: Implementation at the National Level (Art. 2), 13th Sess. (July 29, 1981), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 4, U.N. Doc. HRI/GEN/1/Rev.1 (Vol. I).

136. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD] (emphasis added).

determining the whereabouts or state of health of person deprived of their liberty . . . is required."[137]

Some regional instruments also provide for the right to remedy. The European Convention for the Protection of Human Rights ("European Convention") states that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an *effective remedy* before a national authority."[138] The American Convention on Human Rights ("American Convention") says that "[e]veryone has the right to simple and prompt recourse, or *any other effective recourse*, to a competent court or tribunal for protection against acts that violate his fundamental rights" and that

> [t]he States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of a *judicial remedy*; and (c) to ensure that the competent authorities shall enforce such remedies when granted.[139]

While the African Charter on Human and Peoples' Rights ("African Charter") does not use the language of effective remedy, it essentially provides the same when it states that "[e]very individual shall have the right to have his cause heard."[140]

2. The Right to Reparations and Compensation in International and Regional Instruments

Beyond general provisions espousing the right to a remedy, some instruments provide a specific mandate to international and regional courts to award reparations and compensation for human rights violations. The Rome Statute of the ICC is the only major international instrument that generally discusses reparations and compensation; it provides that the ICC

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137. Declaration on the Protection of all Persons from Enforced Disappearance, *supra* note 53, art. 9 (emphasis added).

138. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (emphasis added).

139. American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention] (emphasis added).

140. African (Banjul) Charter on Human and Peoples' Rights art. 7, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter].

> shall establish principles relating to *reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.* On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.[141]

The right to reparations and compensation is also listed in several regional instruments. If the European Court of Human Rights "finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, *afford just satisfaction* to the injured party."[142] Also in Europe, the Council of Europe's European Convention on the Compensation of Victims of Violent Crimes provides that

> *[c]ompensation shall be paid* by the State on whose territory the crime was committed: (a) to nationals of the States party to this Convention; (b) to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.[143]

The Inter-American Court of Human Rights "shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that *fair compensation be paid* to the injured party."[144] In its 1998 Protocol to the African Charter, the Organization of African Unity declared that the African Court on Human and Peoples' Rights "shall make appropriate orders to

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141. Rome Statute of the International Criminal Court art. 75(1), July 17, 1998, 2187 U.N.T.S. 90 (emphasis added) [hereinafter Rome Statute].

142. European Convention, *supra* note 138, art. 41 (emphasis added).

143. European Convention on the Compensation of Victims of Violent Crimes art. 3, Nov. 24, 1983, Eur. T.S. No. 116 (emphasis added); *see also* M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 224 (2006) ("The European Convention on the Compensation of Victims of Violent Crimes was established . . . to introduce or develop compensation schemes for victims of violent crime, in particular when the offender has not been identified or is without resources.").

144. American Convention, *supra* note 139, art. 63 (emphasis added).

remedy the violation, including the payment of fair compensation or reparation."[145]

On an international and regional level, there are some instruments that call for reparations and compensation for any human rights violation. Other instruments, however, are more specific in their formulations and provide compensation only for specific human rights violations.

3. The Right to Compensation in International and Regional Instruments for Specific Human Rights Violations

Violations of specific human rights, including illegal arrest or detention, torture, and miscarriage of justice have been found to warrant compensation. When a person has been illegally arrested or detained, the ICCPR grants an "enforceable right to compensation."[146] Similarly, if a person has been tortured, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") provides that a state must ensure that a victim "obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."[147] Even though the ICCPR prohibits the use of torture,[148] the document itself does not explicitly require compensation be paid. General Comment 20 by the Human Rights Commission, however, interprets the prohibition against torture in conjunction with the right to an effective remedy, which, it says, includes "compensation and such full rehabilitation as may be possible."[149] The ICCPR also provides that that person "shall be

145. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 27(1), June 9, 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III) (emphasis added).

146. ICCPR, *supra* note 135, art. 9(5) ("Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.").

147. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT]. This article also notes that "[i]n the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation." *Id.*

148. *See* ICCPR, *supra* note 135, art. 7.

149. Human Rights Comm., General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), 44th Sess. (Mar. 10, 1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 33, U.N. Doc. HRI/GEN/1/Rev.1 (Vol. I) ("States may not deprive individuals of the right to an

compensated according to law" for a miscarriage of justice.[150] Last, the International Convention for the Protection of All Persons from Enforced Disappearance gives the victim[151] of enforced disappearance "the right to obtain reparation and prompt, fair and adequate compensation."[152]

There are similar pronouncements in several regional instruments. When a person has been illegally arrested or detained, the European Convention grants an "enforceable right to compensation."[153] When a person has been wrongly convicted through a miscarriage of justice, the American Convention explicitly grants to the right to compensation.[154]

4. Jurisprudential Standards on the Right to Remedy, Reparations, and Compensation

This Section provides an overview of some seminal international and regional cases interpreting the right to remedy, reparations, and compensation. A review of such cases demonstrates how courts have interpreted and enforced the rights outlined in various human rights instruments.

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effective remedy, including compensation and such full rehabilitation as may be possible.").

150. ICCPR, *supra* note 135, art. 14(6) ("When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law . . . ."). The Human Rights Committee has urged state parties to comply with this provision because the commission found it "is often not observed or insufficiently guaranteed by domestic legislation." Human Rights Comm., General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), 21st Sess. (Apr. 13, 1984), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 17, U.N. Doc. HRI/GEN/1/Rev.1 (Vol. I).

151. As defined by the Convention, "'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance." Disappearance Convention, *supra* note 53, art. 24(1).

152. *Id.* art. 24(4).

153. European Convention, *supra* note 138, art. 5(5) ("Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.").

154. American Convention, *supra* note 139, art. 10 ("Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.").

A foundational case on reparations is the *Factory at Chorzów*.[155] While the legal focus in *Chorzów* was a property and land ownership dispute, human rights scholars have paid much attention to the Permanent Court of International Justice's pronouncement on reparations. In its judgment, the court states:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.[156]

The court not only frames reparations as an obligation, but also grounds the right in customary law.[157]

Even though not an international court, the Human Rights Committee ("HRC") has addressed compensation awards. In *Baboeram v. Suriname*, a case of Surinamese nationals who were arrested and murdered by military authorities, the HRC ruled that the victims were deprived of their right to life as articulated in Article 6(1) of the ICCPR and urged Suriname to pay compensation to the surviving families.[158] Six years later, the HRC used stronger language in *Barbato v. Uruguay*, a case in which the Uruguayan government was found responsible for violating the right to life of a citizen who died in detention.[159] The HRC found that Uruguay was obligated to take steps "to pay appropriate compensation to his family" and to bring to justice those responsible for the victim's death.[160]

In the Americas, one of the earliest cases to discuss compensation is *Velásquez-Rodriguez v. Honduras*, which was

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155. *See* Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

156. *Id.* at 21.

157. *See id.*; *see also* Bassiouni, *supra* note 143, at 230 ("A State's duty to make reparations for its acts or omissions is well-established in treaty-based and customary law.").

158. *See* Baboeram v. Suriname, Commc'n. Nos. 146/1983 & 148–54/1983, ¶¶ 15–16, U.N. Doc. A/40/40, U.N. GAOR, 40th Sess., Supp. No. 40, Annex X (1985) ("The Committee therefore urges the State party to take effective steps ... to pay compensation to the surviving families ....").

159. *See* Barbato v. Uruguay, Commc'n. No. 84/1981, ¶ 10(a), U.N. Doc. A/38/40, U.N. GAOR, 38th Sess., Supp. No. 40, Annex IX (1982) ("[T]he Uruguayan authorities failed to take appropriate measures to protect [Barbato's] life while he was in custody ....").

160. *See id.* ¶ 11.

decided in 1988 by the Inter-American Court of Human Rights. Velásquez, a student at the National Autonomous University of Honduras, was detained, tortured, and disappeared by the state of Honduras.[161] The court found that Velásquez's treatment violated Article 7 (the right to personal liberty), Article 5 (the right to integrity of the person), and Article 4 (the right to life) of the American Convention.[162] Responsibility was imputed to the state of Honduras by Article 1(1) of the convention, which requires state parties to respect the rights of the convention and ensure that all persons in their jurisdiction have free and full exercise to those rights.[163] The court found that the obligations to ensure and respect meant that a state must "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[164]

These cases provide some examples of how, why, and on what basis various international adjudicative bodies have awarded reparations and compensation for human rights violations. Additionally, these cases provide a foundation upon which to set the right to reparations or compensation as a principle of international law.

5. UN Documents on the Right to Remedy, Reparations, and Compensation

In addition to international and regional instruments and jurisprudence, the UN has formulated and, in some instances,

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161. *See* Velásquez-Rodríguez v. Honduras, Merits and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 3, 119, 148 (July 29, 1988).

162. *See id.* ¶¶ 155–57, 185.

163. *See id.* ¶¶ 169, 180. Responsibility was imputed to the state because evidence is usually difficult to obtain for disappearances, but the court found that a pattern of disappearances carried out or tolerated by Honduran officials had been proven. *See id.* ¶ 148. Furthermore, Honduras did not carry out serious investigations into the disappearance of Velásquez-Rodríguez. *See id.* ¶ 180.

164. *Id.* ¶ 166. The court allowed the parties to agree on damages, but reserved the right to award an amount of damages if the parties could not come to an agreement. *See id.* ¶ 191. When the parties did not come into an agreement, the court intervened and awarded 750,000 lempiras (500,000 for loss of earnings and 250,000 for moral damages) to Velasquez's wife and children. *See* Velásquez-Rodríguez v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 49, 52 (July 21, 1989).

adopted several documents concerning remedy, reparations, and compensation. Even though General Assembly resolutions are nonbinding, they represent important guidelines.

In 1985, the General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("Declaration"). The Declaration states that victims[165] are entitled to prompt redress in the form of restitution, compensation, and assistance.[166] Further, the Declaration states that victims of abuse of power have also suffered harm "through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights."[167] Where such norms—and their remedies—have not been incorporated into national law, the document encourages states to do so.[168]

The UN has also set forth Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Principles").[169] Concerning the right to reparation/guarantees of nonrecurrence, the Principles state that "[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the state to make reparation and

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165. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 1, U.N. Doc A/RES/40/34 (Nov. 29, 1985) [hereinafter Declaration] ("'Victims' means persons who . . . have suffered harm . . . through acts or omissions that are in violation of criminal laws operative within Member States . . . .").

166. *See id.* ¶¶ 4, 8–17 ("When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to: (a) [v]ictims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) [t]he family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization").

167. *Id.* ¶ 18.

168. *Id.* ¶ 19 ("States should consider incorporating into their national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support."); *see also* Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contests*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 11, 13 (K. De Feyet et al. eds., 2005) ("Abuse of power that is not criminal under national law but that violates internationally recognized norms relating to human rights should be sanctioned and remedies provided . . . ."). *But see* Bassiouni, *supra* note 143, at 217 (arguing that the Basic Principles "are only applicable in the event that the domestic criminal law of a given State has incorporated the applicable international human rights or humanitarian norm").

169. *Principles to Combat Impunity*, *supra* note 73.

the possibility for the victim to seek redress from the perpetrator."[170] Reparations "include restitution, compensation, rehabilitation, and satisfaction as provided by international law."[171] Reparations may come from legislatively created programs, be funded by the state or international donors, or be directed at individuals or communities.[172]

Finally, in 2006, the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles").[173] In its resolution adopting the Basic Principles, the General Assembly articulated its recommendation that states take the Basic Principles into account, promote respect for them, and bring them to the attention of the executive bodies of their governments.[174] The Basic Principles are victim-centric, and outline those remedies available to individuals who are victims of human rights violations.[175] Historically, international law governed actions between sovereign states. If a state breached an obligation or

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170. *See Principles to Combat Impunity*, *supra* note 73, princ. 31, pmbl. ("[T]he following principles are intended as guidelines to assist States in developing effective measures for combating impunity.").

171. *See id.* princ. 34.

172. *See id.* princ. 32.

173. The Basic Principles were formulated over a seventeen-year period separately by Theo van Boven and M. Cherif Bassiouni as special rapporteurs. *See* Special Rapporteur on the Right to Reparations to Victims of Gross Violations of Human Rights, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶¶ 1–2, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (by Theo van Boven) [hereinafter ECOSOC, *Study*]; *see* Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶¶ 1–3, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (by M. Cherif Bassiouni). *See generally* Shelton, *supra* note 168, at 14–18.

174. *See* Basic Principles, *supra* note 115, ¶ 2 ("[The General Assembly] [r]ecommends that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general . . . .").

175. *See* Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 164 (2004) (noting that the Basic Principles adopt a "victim-centered approach").

duty to another state, the latter was entitled to a remedy by the former. Contemporary international law, however, has come to recognize the rights of the individual vis-à-vis the state.[176] When a state violates the rights of the individual in breach of international law, the individual may be entitled to a remedy by the state.[177] The Basic Principles incorporate this idea; they do not create new international law, but rather serve as a comprehensive restatement of existing international law and state obligations.[178] Violations of human rights law provide the victim the right to equal and effective access to justice; adequate, effective, and prompt reparation for harm suffered; and access to relevant information concerning violations and reparations mechanisms.[179]

Specifically concerning reparations, the Basic Principles note that "reparations" is an umbrella term that includes restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition.[180] Reparations should be proportional to the harm suffered and the state "shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law."[181]

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176. ECOSOC, *Study*, *supra* note 173, ¶ 45 ("The principle right [victims of breaches of international human rights law] are entitled to under international law is the right to effective remedies and just reparations.").

177. *See* Riccardo Pisillo-Mazzeschi, *International Obligations to Provide for Reparation Claims?*, *in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCE OF GRAVE VIOLATIONS OF HUMAN RIGHTS 149, 151–52 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999) (noting that the position of the individual in contemporary law is different from the traditional form of international law that was aimed at preventing and resolving conflicts among states).

178. *See* Basic Principles, *supra* note 115, pmbl. ("*Emphasizing* that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law . . . ."); *see also* Roht-Arriaza, *supra* note 175, at 162–63 ("The *Principles* are intended to restate and gather up existing law and practice, not to make new law.").

179. *See* Basic Principles, *supra* note 115, ¶ 11.

180. *See id.* ¶¶ 19–23; *see also supra* notes 113–22 (providing a detailed description of the categories of reparations).

181. *See* Basic Principles, *supra* note 115, ¶ 15.

6. Nepal's International Legal Obligations and the CPA

Nepal became a member state of the United Nations in 1955.[182] Of the international instruments referenced herein, Nepal has ratified, acceded, and succeeded to CAT,[183] the ICCPR,[184] and the International Convention on the Elimination of All Forms of Racial Discrimination.[185]

Nepal's CPA also makes some powerful statements about the protection of human rights. It provides that "[b]oth sides reiterate their commitment to the respect and protection of human rights."[186] Additionally, the parties agreed "to create an atmosphere where the Nepali people can enjoy their civil, political, economic, social and cultural rights and are committed to ensuring that such rights are not violated under any circumstances in the future."[187] Finally, and somewhat vaguely, the CPA states that both parties will "also guarantee the right to relief of the families of victims of conflict, torture and disappearance."[188] The term "relief" is left undefined.

As Nepal attempts to move away from war and authoritarianism toward peace and democracy, transitional justice and international human rights law offer a variety of ways to bring truth and justice to victims of human rights violations. If Nepal fails in this regard, peace and democracy remain tenuous. In deciding which mechanisms to implement, a transitioning society must not only assess its international legal obligations, but must also determine its ability to effectively implement a transitional program. The next Section explores the parameters

182. *See* S.C. Res. 109, U.N. Doc S/RES/109 (Dec. 14, 1955); G.A. Res. 955(X), U.N. Doc. A/RES/955(X) (Dec. 14, 1955) (admitting Nepal as a member state to the United Nations).

183. *UN Treaty Collection*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Feb. 18, 2011).

184. *UN Treaty Collection*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 18, 2011).

185. *UN Treaty Collection*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec (last visited Feb. 18, 2011) (making the following relevant reservation: "His Majesty's Government interprets the requirement in article 6 concerning 'reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available; and further interprets 'satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end.").

186. CPA, *supra* note 33, ¶ 7.1.1.

187. *Id.* ¶ 7.1.2.

188. *Id.* ¶ 7.1.3.

of the right to individual compensation in international human rights law and how that right is affected by the unique circumstances of transitioning states.

II. *INDIVIDUAL COMPENSATION IN INTERNATIONAL LAW AND THE TRANSITIONAL JUSTICE CONTEXT*

Individual compensation poses particular challenges in the transitional justice context because it requires a financial commitment from a state that is likely impoverished. In Part II, this Note focuses on the specific right to individual compensation. Part II.A addresses the scope of the right to individual compensation in international law by reviewing international and regional instruments and jurisprudence and customary international law. Furthermore, this Section separates a mandatory right from a discretionary right to individual compensation—and ultimately determines that, under international law, not all human rights violations create a right to individual compensation. Part II.B examines the impact of individual compensation in the transitional justice context by highlighting both the benefits and challenges of individual compensation. Finally, Part II.B discusses the theory of compensation as development as an alternative paradigm.

A. *The Scope of the Remedy: The Right to Individual Compensation in International Law*

The right to remedy has been articulated in international and regional instruments and jurisprudence.[189] Some scholars also argue that the right to remedy is a norm of customary international law, which gives it binding force.[190] The scope of the remedy, however, remains undefined. This Section will

189. *See supra* Part I.C.1 and I.C.4 (exploring the right to remedy in international and regional instruments and jurisprudence).

190. *See* Bassiouni, *supra* note 143, at 218 ("A survey of contemporary State practice, as evidenced in the substantive laws and procedures functioning in domestic legal systems, confirms the duty to provide a remedy to victims."); Stephen Peté & Max du Plessis, *Reparations for Gross Violations of Human Rights in Context*, *in* REPAIRING THE PAST? INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES 3, 13 (Max du Plessis & Stephen Peté eds., 2007) (discussing how the norms of the Basic Principles are customary law). *But see infra* Part II.A.3 (suggesting that the right to individual compensation has not been established as a principle of customary international law).

explore the extent to which the right to remedy or reparations involves an international legal obligation for states to provide individual compensation for human rights violations. The right to remedy or reparations is not necessarily the same as the right to individual compensation; the latter is but one type of the former.[191] To say that an individual has a right to remedy or reparation is not to say that he or she necessarily has a right to individual compensation. Depending on interpretation, remedy could be as narrow as the right to bring an action before a judicial body to settle a dispute.[192] Conversely, where a specific remedy is not specified, a broad range of remedies is available to provide redress to the victim.[193] Some instruments, such as the ICCPR and the Basic Principles, provide broad parameters regarding the adequacy of the remedy—for example, that it is effective[194] or proportional to the harm[195]—but they fail to provide specific guidance. Similarly, awarding reparations could mean awarding restitution, compensation, rehabilitation, satisfaction, or guarantees of nonrepetition.[196] The question, therefore, is not whether an individual whose human rights have been violated by the state has the right to remedy or reparations,

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191. *See supra* notes 117–18 (noting that compensation is one of five categories of reparations).

192. *See* Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 168 (2002) [hereinafter Tomuschat, *Reparation*] (suggesting that because the French version of the ICCPR uses the word *recours* and the Spanish version uses *recurso*, the most applicable definition of remedy is a legal action brought before a judicial or other body entitled to settle the dispute).

193. *See* Orentlicher, *supra* note 97, at 2570 ("[T]he Commission [on Human Rights] sought to ensure the broadest possible range of remedies for violations of human rights" contained in the ICCPR when it required only an "effective remedy."); *see also* Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, *in* STATE RESPONSIBILITY AND THE INDIVIDUAL, *supra* note 177, at 1, 14 [hereinafter Tomuschat, *Indiviudal Reparation*] (noting that states can provide reparations to its citizens even when a legal framework does not exist).

194. *See* Bassiouni, *supra* note 143, at 214 ("While the ICCPR does not mandate a State Party to pursue a specific course of action to remedy the violation of protected rights, the language of [Article 2(3)] clearly envisages that the remedy is effective, of a legal nature and enforceable."); *supra* notes 135, 179 and accompanying text (discussing the language of remedy in the ICCPR and the Basic Principles).

195. *See* Basic Principles, *supra* note 115, ¶ 15 ("Reparation should be proportional to the gravity of the violations and the harm suffered.").

196. *See supra* notes 113–22 (providing a detailed description of the categories of reparations).

but rather whether that individual has a right to individual compensation as a form of remedy or reparations.

1. Mandatory Right to Individual Compensation

The ICCPR and the European Convention provide a mandatory right to compensation only for unlawful arrest and detention.[197] CAT provides compensation for the family of torture victims who died as a result of the torture.[198] The UN Declaration on the Protection of all Persons from Enforced Disappearances provides compensation for disappearance.[199] These instruments make it clear that there is an international legal obligation to provide individual compensation in the particular and specific situations they stipulate.

It is less clear whether there is a mandatory right to compensation when instruments require domestic implementation. Internationally, the ICCPR states that compensation shall be made "according to [the] law" for miscarriages of justice.[200] CAT mandates that a signatory state "ensure in its legal system" that torture victims have a right to compensation.[201] The International Convention for the

197. ICCPR, *supra* note 135, art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); European Convention, *supra* note 138, art. 5(5) ("Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.").

198. *See* CAT, *supra* note 147, art. 14(1) ("In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.").

199. Declaration on the Protection of all Persons from Enforced Disappearance, *supra* note 53, art. 19 ("The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.").

200. ICCPR, *supra* note 135, art. 14(6) ("When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law."); *see also* Tomuschat, *Reparation*, *supra* note 192, at 167 (arguing that this clause does not establish an individual right, but invites member states to "enact appropriate national legislation").

201. CAT, *supra* note 53, art. 14(1) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.").

Protection of All Persons from Enforced Disappearance mandates that a signatory state "ensure in its legal system" that victims of enforced disappearance have the right to compensation.[202] The rules of the ICTY and the ICTR do not give these courts the power to award compensation; rather, after judgment, a victim may bring an action for compensation in a national court or other competent body "[p]ursuant to the relevant national legislation."[203] Regionally, the American Convention grants compensation "in accordance with the law" for miscarriages of justice.[204] Some may argue that even with this legislative requirement there is still an international legal obligation to provide compensation. It could also be interpreted, however, that for the right to compensation to be available to the individual, the state must first pass national legislation to that effect.[205]

2. Discretionary Right to Individual Compensation

A plain reading of the text of two regional instruments suggests that the right to compensation is discretionary. In the European Convention, Article 41 states that the court may award just satisfaction, which could include compensation for violations of the convention, "if necessary."[206] The American Convention grants compensation "if appropriate" for violations of the rights

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202. Disappearance Convention, *supra* note 53, art. 24(4) ("Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.").

203. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, R. 106, U.N. Doc. ITR/3/REV.1 (1995); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, R. 106, U.N. Doc. IT/32/REV.7 (2009); *see also* ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 200–01 (2004) (discussing Rule 106 of the Rules of Procedure and Evidence for the Criminal Tribunals in Rwanda and Yugoslavia).

204. American Convention, *supra* note 139, art. 10.

205. Tomuschat, *Individual Reparation*, *supra* note 193, at 10 ("[A]ll of the present-day human rights treaties, inasmuch as they mention compensation to the benefit of an individual who has sustained injury, enjoin the State party concerned to enact national legislation for that purpose.").

206. *See* European Convention, *supra* note 138, art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."); *see also* Tomuschat, *Reparation*, *supra* note 192, at 162 ("[The European Court of Human Rights] does not believe it is obligated to compensate an injured party under all circumstances. Thus, it enjoys a broad measure of discretion.").

contained within the convention.[207] Both of these provisions do not preclude the courts from granting compensation, but nor do they require that the courts award compensation in all cases as a right of the individual.

3. Customary International Law Right to Compensation

Even if the right to individual compensation is not established by international and regional instruments, it could be a norm of customary international law. It seems, however, that individual compensation has not yet ripened into customary law because there has not been a consistently demonstrated pattern of states awarding compensation to victims of human rights violations out of a sense of legal obligation.[208] There are examples of states that have paid compensation to victims of human rights violations, but this is generally done at the state's initiative, not because the state was mandated to do so by international enforcement bodies or out of a sense of legal obligation.[209] Further, compensation is usually paid in situations where the number of victims is small or the state is wealthy enough to make the payments.[210] There are also cases in which domestic bodies have determined that compensation should be paid, but the state has refused or been unable to make payment.[211] Because there is no consistent pattern demonstrated

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207. *See* American Convention, *supra* note 139, art. 63 ("If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court . . . shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."); *see also* Tomuschat, *Reparation*, *supra* note 192, at 165 ("The phrase 'if appropriate' introduces, once again, a measure of discretion that allows the court to decide whether compensation should be paid to the victim.").

208. *See* Tomuschat, *Reparation*, *supra* note 192, at 170–71 (arguing that because victims of human rights violations rarely receive adequate reparation, there is no international practice to establish a rule of customary law).

209. *See* Roht-Arriaza, *supra* note 175, at 170–75 (examining the reparations programs of Albania, Argentina, Brazil, Chile, Czechoslovakia, El Salvador, Germany, Guatemala, Hungary, and South Africa, and noting that in each case it was the state that decided to implement a reparations program).

210. *Id.* ("In general, existing reparations programs have involved relatively well-off countries, or those where there is a limited and easily identifiable set of victims.").

211. *Id.* at 174–75 (noting that El Salvador and Guatemala have not paid out reparations even after the state expressed interest in paying reparations); Tomuschat, *Reparation*, *supra* note 192, at 170–73 (examining the case of Guatemala and concluding that "the great majority of Guatemalans who have suffered injury at the hands of

over a period time, it is unlikely that the right to individual compensation has been established as a principle of customary international law.

An analysis of international and regional instruments, customary international law, and scholarly commentary suggests that there is no general international legal right to individual compensation for every human rights violation. Individual compensation is mandated for a few violations, but is not made available for all violations.

B. *The Impact of Individual Compensation in the Transitional Justice Context*

Transitioning states often have difficult, unique, and strategic decisions to make about the mechanisms of transitional justice, including compensation. Some scholars argue that a transitional state is not required to prosecute all violations, and that treaties should be interpreted in a manner that avoids imposing impossible obligations or causing harm.[212] If a state is neither obligated to prosecute all violations nor required to take on the burden of impossible prosecutorial obligations, can the same argument be extended to compensation programs?

In addition to the legal considerations, a state must also evaluate public policy when faced with the prospect of awarding individual compensation. The policy considerations are more poignant in the transitional justice context than in developed, stable states because of the transitional state's political and financial situation and the daunting goal of securing peace and democracy.[213] This Section discusses the general benefits of individual compensation and the particular challenges it poses in

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criminal governments have no chance whatsoever of seeing their reparation claims adjudicated by the [Inter-American] court").

212. *See* Orentlicher, *supra* note 97, at 2598 ("To the extent that the purpose of prosecutions is to vindicate the authority of the law and deter repetition of recent crimes, it is not necessary that a transitional government prosecute all who participated in a previous system of violations."); *id.* at 2600 ("[p]ursuant to general canons of construction, the comprehensive treaties should be interpreted in a manner that avoids imposing impossible obligations or duties whose discharge would prove harmful.").

213. *See supra* note 75 and accompanying text (discussing the forward-looking goals of transitional justice as securing peace and democracy); *infra* note 234 and accompanying text (noting that transitional states are usually impoverished and underdeveloped).

the transitional justice context. This Section also outlines the compensation-as-development paradigm as an alternative to individual compensation.

1. Benefits and Challenges of Individual Compensation

There are benefits of awarding individual compensation that align with the modern trend of recognizing the individual, and not just the state, as rights-holder. Compensation is victim-centric and focuses on the physical, emotional, and moral harm personally suffered by the individual victim.[214] In so doing, it recognizes the victim and attempts to return the victim to the status quo ante.[215] Compensation is one of the most tangible forms of justice. It is often easier to provide than some other types of reparations because it is less threatening to political officials—who might be worried that they will prosecuted—and can be easier to administer.[216]

Because compensation programs require the state to pay monetary awards, however, they raise financial and economic concerns. Past examples demonstrate that it is difficult to successfully implement reparations programs in the face of poverty, inequality, and exclusion.[217]

One aspect that a state might consider when assessing the potential financial obligations of a compensation program is the number of victims. The larger the number of victims, the less likely it is that the state will have the resources to compensate each person for the full extent of his or her injury.[218] If the state

214. *See* de Greiff, *supra* note 114, at 469 (noting that individual compensation "respect[s] personal autonomy").

215. *See supra* note 71 and accompanying text (noting that reparations attempt to right the wrong and return the victim to the status quo ante).

216. *See* Bassiouni, *supra* note 143, at 269 ("Often, compensation can be easier to pursue than criminal prosecution because it is less threatening to authorities."); *see* de Greiff, *supra* note 114, at 469 (noting that individual compensation "[m]ay be easier to administer than alternative distribution methods").

217. *See* Alexander Segovia, *Financing Reparations Programs: Reflections from International Experience*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 114, at 650, 669 (citing El Salvador, Guatemala, Haiti, and Peru as examples of this argument).

218. *See* Heike Niebergall, *Overcoming Evidentiary Weakness in Reparation Claims Programmes*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 145, 146 (Carla Ferstman et al. eds., 2009) (noting that the number of potential claimants "effectively excludes the possibility of resolving the claims within the domestic court system");

has limited financial resources, then the aggregate amount of money it will be required to pay in a comprehensive program may preclude it from rectifying all the human rights violations of which it is guilty.[219] As such, being fair to all victims—both in ensuring that all victims are compensated, and in ensuring that all victims are compensated fully—may be impossible.[220] A compensation program would likely be regarded as unfair or insulting if it privileged certain victims and claims over others or if the amount of compensation awarded was significantly less than the harmed suffered. And if, as a result of a compensation program, the state acquires public debt to finance the program, the entire society is adversely affected because money is spent on repaying that debt instead of on other social programs and needs.[221]

It has been suggested that third-party states should contribute money for compensation programs, particularly if they influenced or interfered in the conflict, but also for humanitarian reasons.[222] While this is a possibility, past experience demonstrates that there can be no expectation that other states will provide adequate funding.[223]

Tomuschat, *Individual Reparation*, *supra* note 193, at 20 (adding that the available national wealth is a limit to reparation recovery commensurate with the injury suffered).

219. *See* Debra Satz, *Countering the Wrongs of the Past: The Role of Compensation*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES 176, 189 (Jon Miller & Rahul Kumar eds., 2007) ("Most countries simply lack the financial resources to offer full compensation to victims, in cases in which the victims number in the thousands or even millions."); Tomuschat, *Reparation*, *supra* note 192, at 174 ("Whenever chaos and anarchy set in, the magnitude of the sums required for effective reparations makes it imperative not only on economic, but also on legal grounds, to call into question the seemingly invincible proposition that reparation must wipe out all of the negative consequences of an injurious act.").

220. *See* Satz, *supra* note 219, at 189 ("Being fair to all the victims may mean that full compensation for their losses, even if it could be calculated, is impossible.").

221. *See* Tomuschat, *Indivudal Reparation*, *supra* note 193, at 19 ("The debts of the State are debts affecting everyone.").

222. *See* Segovia, *supra* note 217, at 658–59 ("There is broad consensus about the fact that the international community could and should contribute to financing programs of reparation, not only for humanitarian reasons and those of solidarity, but also because in some cases foreign actors supported the military regimes or participated directly in the internal conflicts of societies in transition.").

223. *See id.* at 659 (noting that past experience demonstrates that foreign contributions to compensation programs have been modest and limited); Tomuschat, *Individual Reparation*, *supra* note 193, at 20 ("Facing up to the hard consequences of its past is a task that every nation must primarily discharge by its own efforts.").

Individual compensation programs also pose administrative and infrastructure limitations. If the class of victims is large, it is difficult, if not impossible, to individually evaluate and process individual claims for compensation.[224] Moreover, if a compensation program requires a complex administrative apparatus, large amounts of money will be spent on the administration itself, rather than on satisfying claims.[225] Concerning infrastructure, the judiciary is sometimes used to calculate awards and administer funds. In a transitional state, it is likely that the judiciary, if it exists at all, will be underdeveloped and will lack the capacity to deal with compensation claims in an orderly and timely manner.[226] Even if the judiciary is capable of assisting, mass human rights violations present unique challenges regarding evidence, statutes of limitations, and the identification of perpetrators.[227]

Individual compensation programs also have political considerations. If a government lacks political will, a program will be difficult to implement.[228] This lack of political will might exist

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224. *See* Falk, *supra* note 117, at 494–95 ("The magnitude of the harm done . . . makes it impractical to evaluate individual claims on a case-by-case basis in most instances, and therefore is not consistent with the international approach based on the individual that is embedded in international law."); Niebergall, *supra* note 218, at 147–48 (suggesting that past reparations programs "have forced administrators to balance individual justice concerns and aspirations of individual victims with the necessity to bring a just solution to all victims within an acceptable timeframe").

225. *See* Niebergall, *supra* note 218, at 148 (noting that mass claims processing rely on a substantial secretariat and modern information technology); Tomuschat, *Reparation*, *supra* note 192, at 175 ("[L]arge parts of the monies available would have been spent on a bureaucratic apparatus.").

226. *See* Jaime E. Malamud-Goti & Lucas Sebastián Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 114, at 537, 543 ("[I]n certain cases, the transitional state may lack a judiciary capable of dealing with compensation in an adequate and timely fashion."); *see also supra* note 102 and accompanying text (noting the limitations of judicial infrastructure in transitional societies).

227. *See* Malamud-Goti & Grosman, *supra* note 226, at 545–46 ("[F]ailure to file an action in due time is presumed to be an indication of a lack of interest on the part of the plaintiff. . . . Failure to file an action in due time may more likely derive from fear of the perpetrators or from the belief, often justified, that the action will be unsuccessful while the perpetrators remains in power."). It may also be difficult to identify perpetrators where, as in Chile, the identification of perpetrators was made impossible as a result of amnesty laws passed by the government. *Id.*

228. *See* Segovia, *supra* note 217, at 651 (arguing that governments do not always have the political incentives and will to administer a reparations program—and that transitional governments "have other economic and social priorities which could clash

because the post-transition government wants to focus on the future, rather than on the troubled past, which a compensation program would require it to do.[229] If the government determines that its priorities are strengthening democratic institutions and generating conditions for good governance, both of which will require expenditures of public resources, it will be reluctant to allocate money for backward-looking compensation programs.[230]

No more eloquently was this dilemma articulated than by the Constitutional Court of South Africa in *AZAPO v. South Africa.* Even though the focal point of the case was amnesty for perpetrators of human rights violations, the court addressed the competing goals of compensation and the reconstruction of society.

> The resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person . . . .
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> . . .
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> [I]t is much too simplistic to say that the objectives of the Constitution could only properly be achieved by saddling the state with the formal liability to pay, in full, the provable delictual claims of those who have suffered patrimonial loss in consequences of the delicts perpetrated with political objectives by servants of the state during the conflicts of the past.[231]

This problem is especially poignant in states, such as transitioning states, with limited financial resources where decisions to allocate scarce resources are often prone to

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with reparations proposals due to limited public funds and the considerable amount of resources reparations programs require").

229. *See id.* at 651–52 ("[R]eparations are politically difficult issues to manage since they entail digging in the past, which goes against the tendency in the policy of most governments of looking ahead into the future. This is a vision that is reinforced by the fact designing a policy of reparations involves making difficult decisions that could have political consequences most governments are not always willing to assume.").

230. *See id.* at 653 (noting potential tensions that can arise when a state with scare resources tries to strengthen democratic institutions, generate conditions of good governance, and preserve macroeconomic stability).

231. Azanian Peoples Organization (AZAPO) v. President of the Republic of S. Afr. 1996 (4) SA 671 (CC), ¶¶ 43, 46 (S. Afr.).

politicization.[232] Some scholars argue that where civil strife victimizes a large number of people, symbolic measures of acknowledgement with a needs-based conception of reparations provide a more appropriate and effective path to recovery.[233]

2. Reparations and Compensation as Development

The challenges of development—including poverty, weak institutions, poor infrastructure, and inequality—are likely to be exacerbated in transitional societies where the preceding conflict occurred in an already impoverished state.[234] Simultaneously, the consequences of failing to develop are more severe in states trying to secure peace and democracy than in nontransitioning states, particularly where at least one cause of the conflict is related to underdevelopment.[235]

"Development" has many meanings and is measured in various ways, but for purposes of this Note, development means creating conditions for all people to build their full range of

232. *See* Segovia, *supra* note 217, at 655–56 ("Since it is generally the case that available State resources are not sufficient to satisfy increasing social demands as well as comply with the existing state responsibilities and functions owed by the State, it necessarily has to allocate funds according to priorities, which in general respond to political motivations coming as much from the government as from the political parties represented in Congress.").

233. *See* Falk, *supra* note 117, at 492 (arguing that a needs-based approach would try, at least, "to enable those who have been disabled, or find themselves in acutely vulnerable circumstances, to be given the means by which to restore a modicum of dignity to their lives.").

234. *See* RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 3 (2002) ("The vast majority of armed conflicts today are located in low-income or developing countries, whose indigent populations and fragile economies are further impoverished in the process."); Pablo de Greiff, *Articulating the Links between Transitional Justice and Development: Justice and Social Integration*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 28, 29 (Pablo de Greiff & Roger Duthie eds., 2009) (noting that transitional societies "are frequently beset by poverty, huge inequalities, weak institutions, broken physical infrastructure, poor governance, high levels of insecurity, and low levels of social capital"); Marcus Lenzen, *Roads Less Traveled? Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT, *supra*, at 76, 78 (noting that many transitional states are less developed); Roht-Arriaza, *supra* note 175, at 186 ("Most communities affected by . . . massive conflict were desperately poor before the conflict started—indeed, in many cases poverty and inequality are key underlying causes of the violence.").

235. *See* Lenzen, *supra* note 234, at 83 ("After a violence conflict or a period marked by massive human rights violations, it is thus even more important to change or develop the capacity of state (and societal) institutions to foster conditions for peace coexistence for all citizens.").

capabilities by expanding the freedoms people enjoy.[236] This may be done, at least in part, by addressing real or perceived socio-economic, political, or cultural injustice and inequality.[237] Development in transitional societies is a pressing concern because the consequences of failing to develop, including civil unrest and threats to peace and democracy, can be grave. Recent scholarship has begun to explore the concept of reparations as development whereby a reparations program is planned to complement development.[238] This approach has benefits and drawbacks—and is controversial.

Where reparations are distributed to the community and take the form of development programs, a greater number of people benefit than if the reparations were distributed just to individuals. Community reparations address harms to social cohesion and recognize the wrong done to the entire community, including those who might not otherwise be categorized as victims but nevertheless may have been detrimentally affected by the conflict.[239] Community reparations advance goals of social solidarity and equal citizenship.[240] They can also prevent nonvictims from resenting victims who receive

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236. *See generally* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); *see also* Tony Addison, *The Political Economy of the Transition from Authoritarianism*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT, *supra* note 234, at 110, 113 ("[D]evelopment is about getting the 'right' policies and institutions in place to build up, over time, society's stock of human and physical capital—thereby delivering rising prosperity accompanied by absolute poverty reduction."); Naomi Roht-Arriaza & Katharine Orlovsky, *A Complementary Relationship: Reparations and Development*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT, *supra* note 234, at 173 ("Development is increasingly conceptualized not as a goal or end point but as an ongoing process, in which the agency, self-organization, and empowerment of those at the bottom of the economic pyramid are at the same time the means of reaching success and the goal itself.").

237. *See* MANI, *supra* note 234, at 8 (referring to this process as distributive justice); Lenzen, *supra* note 234, at 84 ("Development should be concerned with the structural conditions of inequality and poverty . . . .").

238. *See generally* Roht-Arriaza, *supra* note 175, at 186–89 (outlining the reparations as development model); Roht-Arriaza & Orlovsky, *supra* note 236, at 170–207 (providing a more extensive analysis of the reparations-as-development model).

239. *See* Roht-Arriaza, *supra* note 175, at 186 ("Community-based development projects recognize the wrong done to the community as a whole . . . ."); Roht-Arriaza & Orlovsky, *supra* note 236, at 189 ("Collective reparations . . . respond to collective harms and harms to social cohesion.").

240. *See* Roht-Arriaza & Orlovsky, *supra* note 236, at 185 ("[T]o the extent that reparations programs emphasize the goals of social solidarity, recognition, and equal citizenship, they can provide conduits for people to begin to exercise that citizenship in myriad ways.").

individual compensation.[241] What is more, community services may actually rebalance power in favor of victims if nonvictims see that new or enhanced services were brought to the community because of the victims.[242] In an already fractured society trying to heal the wounds of past conflict, new divisions could be detrimental. Additionally, if living standards for the majority of people improve, the society will more likely align itself with the new political order and be interested in ensuring its continuance.[243] As such, community reparations may address post-conflict concerns like inequitable distribution of resources and access to political and economic resources.[244]

On a practical level, when the state channels disbursement of community reparations through existing state institutions and service-providers, the process is often more efficient, less politically sensitive, and requires less new bureaucracy.[245] Third-party states more interested in development might be more willing to invest in community reparations as development than they would in just a reparations program.[246] When community reparations take the form of direct services, fraudulent behavior by citizens seeking financial compensation from the state decreases.[247] Finally, in community reparations programs, the

241. *See id.* at 182, 192 (suggesting that setting up dedicated services for victims, to be used exclusively by victims, might create new resentments).

242. *See id.* at 194 ("If needed services for all come to the community because of the needs . . . of victims and survivors, it provides them with a source of status and pride in the eyes of their neighbors . . . . By making clear that victims are the reason that services arrive, even if those services benefit everyone, collective reparations can begin to address an existing power imbalance.").

243. *See* Addison, *supra* note 236, at 130 ("[I]f . . . living standards start to grow, then the populace has some stake in the new political order; and demagogues will find it harder to recruit followers when the young have new livelihoods.").

244. *See* MANI, *supra* note 234, at 9 ("The concern of distributive justice is how post-conflict societies deal with grievances such as inequitable distributions of and access to political and economic resources that underlie conflict.").

245. *See* Roht-Arriaza & Orlovsky, *supra* note 236, at 192 ("Collective reparations may allow [governments] to funnel programs into existing ministries, seem more efficient and less likely to be politically sensitive, require less new bureaucracy, and seem more acceptable to budget-conscious managers and creditors.").

246. *See* Roht-Arriaza, *supra* note 175, at 188 (arguing that if the issue is framed as development rather than redress, funds from third-party states might be more forthcoming); *see also supra* notes 222–23 (suggesting that it has been difficult to get third-party states to provide funding for reparations programs).

247. *See* Roht-Arriaza & Orlovsky, *supra* note 236, at 187 ("[I]n countries with few jobs and extensive poverty, it would be surprising if the promise of money did not elicit all kinds of fraudulent behavior, including false claims of victimhood.").

state does not have to define the class of victims eligible for reparations; whenever the class of beneficiaries is expanded, it lessens the benefits each beneficiary receives, thereby failing to satisfy anyone.[248] Where resources are limited, the choice may be between community reparations or small individual reparations that are meaningless.[249]

Community reparations, however, can be problematic. First, reparations might be a legal obligation for the responsible parties to address past injustice against individuals.[250] When the state does not provide reparations to individuals, the state does not fulfill its legal obligation.[251] Furthermore, community reparations fail to recognize the specific harm to the individual and the rights that the individual holds vis-à-vis the state.[252] Community reparations also allow the state to provide that which it is already supposed to provide—namely development—while simultaneously fulfilling its legal obligation to redress past injustice.[253] Not only does this allow the state to bypass its obligations, but it also turns victims into ordinary citizens who are

248. *See* Addison, *supra* note 236, at 131 ("Given the multiplicity of needs, it is tempting to promise to do everything. Then the danger is that a weak implementation capacity is spread too thinly, so that little if any tangible benefits results."); de Greiff, *supra* note 234, at 40 ("Expanding the scope of beneficiaries will likely entail the dilution of benefits to the point that *no one* is satisfied by them.").

249. *See* Roht-Arriaza & Orlovsky, *supra* note 236, at 193 ("[I]n conditions where there is resource scarcity and a large number of victims, the choice may be between, on the one hand, collective reparations and, on the other hand, no material reparations at all, or individual compensation so meager as to be insulting.").

250. *See id.* at 202 ("To serve their expressive and symbolic function, reparations should come primarily from the parties responsible for the violations."); *see also supra* notes 113–22 (providing a detailed description of the categories of reparations).

251. *See* Roht-Arriaza, *supra* note 175, at 188 (noting that human rights groups have concerns that reparations as development is "an abdication of the state's legal obligation to respond to past injustices").

252. *See* de Greiff, *supra* note 234, at 40 ("[R]eparations entail an acknowledgement of responsibility and an effort to target victims particularly for special treatment . . . ."); Roht-Arriaza & Orlovsky, *supra* note 236, at 189 ("Individual reparations serve as recognition of specific harm to an individual, and of an individual's worth as a rights-bearing citizen."); *id.* at 206 ("[R]eparations must have at least some individualized component to fulfill its goals . . . .").

253. *See* Roht-Arriaza & Orlovsky, *supra* note 236, at 192 ("Advocates have pointed out that using reparations funds to provide nonexclusive goods or services to underserved populations (including but not limited to victims) allows the government to get off too easy: it need only do what it should be doing anyway and slap a reparations label on it.").

receiving no more than they ought to from the state.[254] Finally, because community reparations are presented as development rather than a source of redress for harm suffered, the society risks overlooking the significance of the harm.[255]

Nepal has an international legal obligation to provide compensation for certain human rights violations. Where that right is discretionary or nonexistent, however, Nepal has options about how to proceed. Given the unique circumstances of the transitional justice context, and the pressure to ensure the survival of peace and democracy, Nepal, and other transitioning states, might consider the compensation-as-development program a viable alternative.

III. *STRUCTURING A COMPENSATION PROGRAM IN NEPAL AND OTHER TRANSITIONAL SOCIETIES*

One of the central questions of this Note is whether there is an international legal right to individual compensation for human rights violations.[256] While the transitional justice context does not change legal obligations, it poses unique challenges.[257] A transitioning state is not only dealing with a record of past human rights violations, but is also trying to secure peace, enhance democracy, and develop.[258] Attainment of these goals requires financial commitments, as does a compensation program. The question therefore becomes: can a state fulfill its international legal obligation to provide compensation for human rights violations while also working toward its long-term

254. *See* de Greiff, *supra* note 114, at 469 ("The more the program concentrates on a basic service package, the less force the reparations will have, as citizens will naturally think that the benefits being distributed are ones they have a right to as citizens, not as victims."); Roht-Arriaza & Orlovsky, *supra* note 236, at 192 (noting that community members "may consider the upgrading of their communities to be a right provided by citizenship").

255. *See* Roht-Arriaza & Orlovsky, *supra* note 236, at 191 (noting that where the projects have no tie to the nature or type of harms they are supposed to redressing, there can be a "lack of understanding of their purported purposes among beneficiaries").

256. *See supra* Parts I.C and II.A (analyzing the international legal right to compensation in instruments and jurisprudence).

257. *See supra* Part II.B.1 (discussing the challenges that exist in transitional justice situations).

258. *See supra* notes 75, 235 and accompanying text (discussing the transitional justice goals of peace, democracy, and development).

goals of peace, democracy, and development? If a state can do both simultaneously, how should the compensation program be designed to optimize progress toward both ends?

This Part will first review the right to individual compensation, in general and in the context of transitional justice. Throughout, this Part will make recommendations for the design of a transitional justice compensation program so that it fulfills international legal obligations and supports the long-term goals of transitional justice. The recommendations will be directed at Nepal, but could be applied to other underdeveloped transitioning states.

Victims of human rights violations have a broad right to remedy and reparations and a narrow right to individual compensation.[259] Individual compensation is a specific form of remedy or reparations, but there is only a small category of violations for which states are legally mandated to provide individual compensation.[260] The current international legal framework does not provide the right to individual compensation for every human rights violation.[261] It is beyond the scope of this Note to evaluate whether the rights for which there is a legal obligation to provide compensation should be expanded, but that is certainly a worthwhile inquiry.

A state has a legal obligation to provide compensation for violations of rights protected in international instruments to which the state is a signatory and which require compensation. Nothing, however, prevents the state, on its own initiative, from expanding the catalog of human rights for which it will provide compensation if violated. Beyond its legal obligations, a state should award compensation for as many human rights violations that its financial capacity allows. Transitioning states, including Nepal, however, are unlikely to be able to expand that catalog of rights primarily because they tend be disproportionately poor.[262]

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259. *See supra* Parts I.C and II.A (analyzing the international legal right to compensation in instruments and jurisprudence).

260. *See supra* Part II.A.1 (discussing the mandatory right to individual compensation for certain human rights violations).

261. *See supra* Part II.A (analyzing the international legal right to individual compensation).

262. *See supra* note 232 and accompanying text (noting the challenges to development in the transitional justice context).

They also face other major obstacles.[263] Therefore, a compensation program in a transitioning state is likely to be different from one in a developed, wealthy state.[264] Given these realities, how should Nepal design a compensation program?

First, it is necessary to examine Nepal's international legal obligations to provide compensation as required by the international instruments to which it is a signatory.[265] If Nepal does not provide compensation to victims of violations for which the instruments require compensation, Nepal will violate its international legal obligations. Strict enforcement of resource-based rights, including compensation, is difficult; if Nepal is not in compliance, the human rights community should pressure Nepal to fulfill its legal obligations.

Second, because international legal obligations are only a minimum requirement, Nepal should evaluate its ability to provide compensation for a greater catalog of rights than is legally obligated. Because doing so would require greater financial resources, Nepal would have to evaluate several important factors. Nepal should not make commitments that it is unable to fulfill; victims might rely on the prospect of a promised financial package, and if that package never comes or is substantially delayed, they could be detrimentally affected. It would be unethical to inform victims that the state will provide them compensation and then not provide it. Additionally, society, and not just the victims, could potentially lose trust in the new, post-conflict government if it makes promises it is unable to fulfill. After conflict, the new government must distinguish itself from the previous regime and establish its credibility.[266] If the state makes undeliverable promises in the interest of political expediency, it could destabilize the government—and, worse still, plunge the state back into conflict. Therefore, Nepal should not promise compensation to victims of human rights violations,

263. *See supra* Part II.B.1 (discussing the financial, administrative, and political challenges of transitional justice).

264. *See supra* note 210 (noting the differences between a reparations program in a wealthy state and one in an underdeveloped state). Consider, for example, the compensation program in the United States when it awarded compensation to Japanese-Americans interned during World War II.

265. *See supra* Part I.C.6 (detailing Nepal's international legal obligations based on the international instruments to which it is a signatory).

266. *See supra* note 76 and accompanying text (discussing the need for the post-conflict government to demarcate itself from the conflict government).

beyond those it is required to compensate, if it knows it cannot financially provide that compensation in a timely manner.

Third, Nepal should consider the other mechanisms of a comprehensive transitional justice program through which it can provide justice. While compensation is the most tangible remedy—and often the one most desired by victims—it is not the only component of a transitional justice program.[267]

When a state such as Nepal cannot provide compensation to all human rights victims, it still might have a legal obligation to provide reparations or remedy. Both "reparations" and "remedy" are broad concepts that come in many forms.[268] This breadth of options is advantageous in the transitional justice context because it allows the state to select the mechanisms most appropriate and applicable for its particular circumstances. Unless legally obligated or otherwise decided, Nepal can provide various forms of reparations and remedies, some of which do not cost anything. For example, a state apology is a low-cost or no-cost form of reparations that, when genuine, can help advance the goals of justice, truth, and reconciliation.[269]

Some victims may seek adjudication rather than compensation; they want the person responsible for committing human rights violations to be held accountable. That adjudication could have a greater effect on the goals of transitional justice than a compensation award.[270] Nepal, therefore, should ensure its domestic legislation criminalizes human rights violations and incorporates its international legal obligations. It might also examine and extend, if necessary, the statute of limitations for certain crimes to cover human rights violations that occurred during the internal conflict. Then Nepal can encourage victims to bring cases in the domestic court system. Nepal might even consider establishing a separate court to adjudicate cases of human rights violations that occurred during the internal conflict. In either instance, victims ineligible

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267. *See supra* Part I.B.2 (outlining the mechanisms of a comprehensive transitional justice program).

268. *See supra* notes 113–22 (providing a detailed description of the categories of reparations).

269. *See supra* note 120 and accompanying text (listing a state apology as a form of satisfaction, which is a category of reparations).

270. *See supra* notes 97–101 and accompanying text (outlining the benefits of transitional justice prosecutions).

for state compensation could seek compensation from the individual perpetrator of the crime if the court finds the perpetrator guilty of the offense in a civil case.

Prosecutions will require expenditures of limited state financial resources (e.g., salaries for judges and court staff, construction of new courthouses). A transitional justice prosecution program, however, would advance progress on two goals: fulfilling the right to remedy and bolstering the capacity of the judiciary.[271] A strong judiciary is an important element of a post-conflict state because it can help end the pervasive culture of impunity that likely existed before and during the conflict or was a cause of the conflict.[272]

The most successful transitional justice program may be an integrated and comprehensive one.[273] No single mechanism alone will meet all the goals of transitional justice. Significantly, using different mechanisms in conjunction with one another can fill in the gaps created when only some mechanisms are used. For example, if a state decides to provide compensation for only those violations for which it has a legal obligation, a truth commission could still be valuable to those ineligible for compensation. Using all of the mechanisms together makes it more likely that every victim will receive some justice. Moreover, a comprehensive program will likely affect all of society, even those who were not victimized.

Fourth, Nepal should consider the compensation-as-development model.[274] This model raises legitimate concerns, the most important of which is that it does not address the harm caused to an individual.[275] Nevertheless, the societal benefits can be profound if the model is properly implemented.[276] Instead of expanding the class of victims eligible for compensation beyond that which is legally required, or expanding the class to a number

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271. *See supra* notes 97–101 and accompanying text.

272. *See supra* note 97 and accompanying text (noting how prosecutions and a strong judiciary can counter the culture of impunity).

273. *See supra* Part I.B.2 (outlining the mechanisms of a comprehensive transitional justice program).

274. *See supra* Part II.B.2 (discussing the reparations- and compensation-as development paradigm).

275. *See supra* notes 250–55 and accompanying text (discussing the controversies of the reparations- and compensation-as-development paradigm).

276. *See supra* notes 239–49 and accompanying text (discussing the benefits of the reparations- and compensation-as-development paradigms).

beyond its financial capacity, Nepal might consider investing that money in large-scale development projects. The state would have to decide the specific nature of these projects, but they could include investment in education, health, or infrastructure. Because development benefits all of society, rather than a select number of individuals, it is more likely to realize the goals of transitional justice. When basic needs are met, people are more likely to embrace peace. When the government provides those needs, people are more likely to trust the government (and the emerging democracy).

Compensation as development should not be adopted in every state that has perpetrated human rights violations; rather, this model should be confined to states that are underdeveloped, poor, and transitioning from war or authoritarianism to peace and democracy. If a state has the financial resources to compensate a large class of victims, it should do so. But where those financial resources are limited, the state must make legally strategic and practical choices about the most effective way to proceed.

CONCLUSION

Nepal is on the cusp of progress, but its future of peace and democracy is uncertain. Transitional justice offers a range of options through which Nepal can provide justice to victims of human rights violations. Nepal must fulfill its international legal obligations, especially with respect to individual compensation. Beyond that, however, Nepal should consider a reparations or compensation-as-development program that will simultaneously address the backward-looking (justice and truth) and forward-looking (peace, democracy, and development) goals of transitional justice. In so doing, Nepal will increase the likelihood that the peace and democracy for which thousands of people died will firmly take root and provide a foundation for a prosperous future. Only then can Nepal have its Shangri-la.