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## b.2. Artikel

### 5 **The Right to Reparation Program for Victims of Conflict: A Case Study of Peace-building Efforts within Post-Conflict Ambon**

Yustina Trihoni Nalesti Dewi

1 Ambon is a migrant town in Indonesia known throughout history for its accommodating and welcoming view of different communities, beliefs, and ethnic backgrounds amongst its population. However, in 1999, a vicious conflict, ostensibly for religious motivations, caused widespread damage, loss of life, and displacement. Although the conflict has since subsided, effects linger due to the inefficiency or unavailability of effective reparations programmes offered by the Indonesian Government to remedy the damage caused. This article discusses a common argument proposed in defence of the State's inaction, namely that State reparations are not applicable for horizontal conflicts, and contends that Indonesia is internationally obligated to take reparative action. The article then discusses the types of reparations that should be made available, its relevance for the Ambonese victims, and the importance of collective remedies owing to the specific communal nature of Ambonese society. The article concludes that reparations are necessary and obligatory, and Indonesia should undertake these efforts to accommodate healing, reconciliation, and to prevent the re-emergence of similar conflicts.

#### I. Introduction

Ambon is a city known for its plurality with regards to both the ethnic and religious affinity of its inhabitants. For centuries, peoples of different backgrounds and faiths had lived together in harmony, brothers and sisters side-by-side, as reflected in the Ambonese adage *hidop orang basudara* ('living in brotherhood').<sup>1</sup> Deservedly, Ambon is often colloquially known as *Ambon Manise* ('sweet Ambon'), reflecting a communal commitment to always live together in harmony. However, the Ambonese conflict of 1999-2002 caused the once peaceful city to become an extraordinary arena of violence, wherein peoples could reciprocally kill, destroy and humiliate because of clashing religious identities.

The conflict surprised many, and gave rise to serious concerns of whatever happened to sweet *Ambon Manise*. Ambon's local wisdom reflecting the *manise* life, since the beginning, always has always taught how to live in brotherhood through the

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<sup>1</sup> Aholiab Watloly, *Maluku Baru, Bangkitnya Mesin Eksistensi Anak Negeri* (Yogyakarta: Kanisius 2005), pp. 211-214.

internalization of *hidop orang basudara* values through *Pela* and *Gandong*. These are deeply ingrained relations of mutual goodwill and friendship, leading to a commitment to live together in harmony. *Pela* and *Gandong* bonds in the *hidop orang basudara* philosophy had been propagated by generations so they could ward off any effort of destroying Ambon's harmony as a habitat of life.

However, the efficacy of *hidop orang basudara* and *Pela* and *Gandong* local wisdoms in preventing conflicts should be examined when only because of a minor dispute between two youths from different communities, Christians and Muslims respectively, Ambon was then dragged into a high-mass and massive escalation conflicts. A small incident during the Eid al-Fitr commemoration at Batumerah, between Muslim and Christian youths, had sparked widespread and enlarged conflicts.<sup>2</sup> Ambonese people who once lived peacefully, suddenly found themselves having to fight, a situation that forced them to be conflict actors and victims of the conflicts at a time. Because of the anger and hatred coming from nowhere, Ambon was then completely segregated and devastated. In the period of 1999-2002, thousands of people died, injured and physically disabled, 80% of public facilities and homes were destroyed, thousands of people also became refugees and homeless losing land they occupied for life and lost property. Even the suffering and impact of the conflicts remain existing today.<sup>3</sup>

The suffering of the Ambonese communities added by the obscurity of the reparation program made available for the victims of the conflict are still felt to date. Many of excuses and interpretations claiming that the violence in Ambon amounted to a horizontal conflict between two religious communities had obscured the issue of victim reparation. A 'reparation' in the technical sense of the word is considered a recovery effort that a State is obliged to provide if the State has committed violations to its citizens' rights. Therefore, in horizontal conflicts, the State's obligation to make reparations are often put into question. In particular with regards to the Ambon issue, it is often claimed that if the State conducts a reparation, it does not arise because of the State's obligation as a consequences of unlawful acts, but only as goodwill and as part of the State's task to organize and manage the life of its subjects.

## II. Contextualisation of the Ambon Conflict

Ambon is the capital of the Province of Maluku and has long been an epicenter of culture and economy, rich in local wisdom and customary practices. Ambon is a multi-ethnic migrant town with inhabitants from varying ethnic, religious, and traditional backgrounds. Ambonese immigrants originated from a multitude of regions, both inside and outside of Indonesia, creating an Ambonese society that is pluralistic in nature and was welcoming to

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<sup>2</sup> C.J. Böhm, *Brief Chronicle of the Unrest in the Moluccas*, Unpublished, Crisis Centre Diocese of Amboina, Daily Report of Ambon Conflicts, 2006, p. 11

<sup>3</sup> Yustina Trihoni Nalesti Dewi, Jonathan Kwik & Aholiab Watloly, 'The Strategic Role of Lembaga Adat Negeri in the Fulfilment of Victims' Rights to Reparation in Post-Conflict Ambon' (2017) 1:2 Udayana Journal of Law and Culture 157, 162-163

diversity<sup>4</sup>. In the past, migrants subsequently established their own communities in Ambon after settling, giving rise to districts inhabited by groups of Chinese, Arabic, Javanese, Timor, Toraja, Bogor, Tapa, Kisa and other ethnicities. These migrants identified themselves not merely based on their respective ethnic group or merely being Ambonese but are simultaneously in a so-called cross-cutting affiliation<sup>5</sup>.

In 1999 the Maluku sectarian conflicts erupted and quickly widespread to cause sufferings and damages in Maluku. A small spark in the form of political rivalries between Ambonese gangs in Jakarta eventually spread to Ambon and triggered the first conflict in January 1999 after a relatively small incident between Muslim and Christian youths on the Feast of Eid day at Batumerah.<sup>6</sup> Due to the segregated nature of Ambonese society, this conflict quickly spread and culminated in a widespread civil war between religious factions, predominantly that of Muslims against Christians.

The Ambon conflict was not propagated by religious tensions and hate alone. Many historical, cultural and political factors also played a decisive role in fueling the conflict. Some studies alleged that the conflicts and violence occurring in Maluku were systematically incited and propagated by military and political leaders' agendas in Jakarta for political and economic motivations. Moluccas Christians, who were traditionally majority in that area, were threatened by the gradual influx of Muslims post-1965. Many of these new inhabitants were Javanese Muslim political prisoners accused by Soeharto's New Order of collaborating with the Communist Party (PKI). Muslims also arrived by virtue of the New Order's transmigration policy, in particular from the Muslim-dominant Buton, Bugis and Makassar regions, in addition to the migrants coming to Ambon because of their own initiative.<sup>7</sup> The Christian Ambonese initially welcomed the migrants as low-waged manual workers but the Muslims gradually raised their economic and political standing and started to occupy important government and bureaucratic positions.<sup>8</sup> This presented a threat to the Christians who were content with the status quo.

Propaganda and hate speech spread during the conflict reflected the underlying complex political and economic strife between the groups. On the one hand, Christians spread the fear of the Islamisation of national Indonesian politics and the threat of a transition into an Islamic or Sharia state.<sup>9</sup> Indonesian National Army (TNI) soldiers were accused of taking no action to stop the conflict and allegedly even supporting the Muslims when slaughtering Christians. On the other hand, Muslims propaganda primarily political and educational opportunities from the Dutch colonial rulers. Suspicion was also directed at the Christians for not supporting The Royal Dutch Indies Army (KNIL).<sup>10</sup>

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<sup>4</sup> Aholiab Watloly, 'Gambaran Umum Kota Ambon', Manuscript presented to the Desain Ruang Publik berbasis Kearifan Lokal Kota Ambon FGD (Ambon, October 2016) pp. 2-4.

<sup>5</sup> *Ibid.*

<sup>6</sup> Böhm, *op.cit.*, p. 11.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* This unfounded perception ignores the fact that Ibrahim Ohorella, Muslim raja of Tulehu, had hosted numerous RMS meetings, directed his subjects to attend an RMS proclamation of independence in Ambon and stockpiled sago rations for the RMS armed forces before Tulehu was occupied by the TNI. See Richard Chauvel (dissertation) in George J. Aditjondro, 'Orang-orang Jakarta di Balik

The conflict persisted and escalated over a long period of time. From January 1999 to October 2002, approximately 15,000 individuals were reported dead and 8,000 injured and 187 schools, 103 public offices, 39 medical facilities, 13 hospitals, 23,600 houses, and 144 churches and mosques were destroyed or burned. The war displaced 425,679 people, 80,686 of which were forced to leave their native districts.<sup>11</sup> Refugees had to seek shelters in schools and religious sites. During the time Ambon was segregated even further. Civilians were grouped based on the identities of religion, market, schools, hospital, office, commerce, route of transport. The whole population was separated by a firm line of Muslims versus Christians.

### III. Whether the victims of the Ambonese Conflict are entitled to reparation

State responsibility to provide reparations can be triggered by violations amounting to the following scenarios: First, grave violations to international human rights laws, such as the right to life, right to freedom, and the prohibition on any forms of torture or inhumane or degrading treatment. Second, grave violations to international humanitarian law, often colloquially referred to as the law of war. A substantial part of these two bodies of law – international human rights laws and international humanitarian law – are part of customary international law and may even constitute *ius cogens*. As such, these norms are applicable to all States in the world and, in the case of *ius cogens*, cannot be derogated from.

With regards to the conflict in Ambon, the primary question thus becomes: Does the Ambonese conflict, which had resulted in widespread loss of life, loss of income, property damage, and displacement, fall under one of the categories enumerated above, for the purposes of triggering State responsibility and a duty to provide reparations? In practice, the delineation of the Ambonese conflict as one of these categories proves more complicated than expected.

It is controversial to classify the conflict in Ambon as grave violations of humanitarian law, as humanitarian law presupposes the existence of an armed conflict, either international or non-international in nature, before it can be applied. Here, there arguably did not exist an armed conflict in the definition of the Geneva Conventions and its Additional Protocols. Although the two parties to the conflict, namely Muslim and Christian groups, did use weapons both in the form of firearms and conventional weapons, the scope of the use of such violence and the eventual military intervention is insufficient to be classified as an 'armed conflict' (war) as understood within international humanitarian law.<sup>12</sup>

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Tragedi Maluku', available at: <http://www.michr.net/orang-orang-jakarta-di-balik-tragedi-maluku.html>, accessed 31 October 2018.

<sup>11</sup> Anonymous, 'Refugees Of Maluku And North Maluku And Their Problems', Background Paper for Lobbying Material, Session of UN Commission for Human Rights at the Agenda of Internally Displaced People in the Region of Maluku and North Maluku (April 2003, unpublished), p. 1.

<sup>12</sup> See and compare, e.g.: Common Articles 23 to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered

Alternatively, one can attempt to argue that the Ambonese conflict was one of human rights laws violations. However, such a claim is also not without potential issues. It is uncontroversial to put forward that State responsibility is triggered whenever a Government Agency or a State Actor, acting on behalf of the State, engages in human rights violations. In contrast to this, however, the conflict in Ambon was not committed by State authorities. Violations during the Ambon conflict were committed by independent actors or groups acting in private capacity, for personal or religious motivations. The question that must be put forward at this junction is therefore whether State responsibility is still applicable for such conflicts which are decidedly horizontal in nature.

According to human rights laws theory, a State's responsibility vis-à-vis its nationals' human rights encompasses<sup>14</sup> to respect, protect, and fulfil. The duty to respect implies that a State must ensure that its own actors do not violate human rights laws. In contrast, the duty to protect is more active in nature, imposing an obligation to proactively ensure the human rights of its subjects. Finally, the duty to fulfil refers<sup>16</sup> to the State's obligation to facilitate the enforcement of human rights in its territory.

General Assembly Resolution 56/83<sup>7</sup> on State Responsibility states that there is an internationally wrongful act of a State "when conduct consisting of an action or omission (...) [i]s attributable to the State under international law (...) [and c]onstitutes a breach of an international obligation of the State."<sup>13</sup> In particular, this Resolution mentions that both commissions and omissions can constitute an internationally wrongful act. Violations occurring in the territory of a State, irrespective of whether they occur due to active commission by State actors or due to an omission by the State to prevent such violations from occurring, amount to fundamental failures of governance, giving rise to State responsibility.

Based on this rationale, several incidents, both short-term and long-term, can be identified as having occurred in Ambon which may give rise to State responsibility by virtue of either commission or omission:

- a) The structural suppression of local communities' rights during the Soeharto Order  
Before the Soeharto Order, local communities in Indonesia enjoyed extensive freedom with regards to local governance. It was then also the case that communities

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<sup>2</sup> into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Art. 1(4); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 1(1).

<sup>13</sup> UNGA Res A/RES/56/83, Responsibility of States for internationally wrongful acts, Adopted 28 January 2002, Annex, Art. 2.

with strong cultural values such as Ambon commonly applied traditional laws and norms (referred to as adat laws in Indonesia) for dispute resolution and choice of governmental agencies and leaders, amongst others. This autonomy was stripped away with the advent of the Soeharto Order, which instead sought to impose a uniform structure of government throughout Indonesia, in all levels of social life. Law 5 on Local Governments enacted in 1979 systematically suppressed the freedom enjoyed by local communities to regulate their own political structures by imposing rules typical of Javanese (specifically Jakartan) governance. This style of governance was top-down in nature and centralised, and left little room for open discussion and societal participation. Any dissent was repressed violently, sometimes even through military intervention and grave human rights violations.<sup>14</sup> The Indonesian national motto *Bhineka Tunggal Ika* ('unity in diversity') was perversely interpreted by the Soeharto Order as a carte blanche to suppress any elements acting (or being perceived as acting) in contravention to the Government, labelling them as subversive.<sup>14</sup>

After the fall of the Soeharto Order, rights to exercise local autonomy was again granted throughout Indonesia, granting communities such as those in Ambon the legal right to re-impose traditional approaches to governance and the opportunity to revisit their old identities and values. The marginalisation and discrimination experienced during the Soeharto Order finally subsided, and recent developments show that such application of traditions and adat laws have proven the most effective way towards long-term peace building, reconciliation, and social cohesion.<sup>15</sup>

#### IV. The Ambon Conflict as a grave violation of human rights

A question that frequently arises is whether such a conflict as in Ambon can be construed as a violation against human rights. By narrowing the notion of human rights violation as a violation of the citizens' fundamental rights the occurrence of massive atrocities in Ambon should be then seen as a violation against their fundamental rights. The further question was who had violated the human rights in the conflict? The State made excuses to dodge from its responsibility as the perpetrator of human rights violations by considering it as a horizontal conflict. To dismiss such opinion a research then needed to be carefully conducted.

The plural and segregated citizens of Ambon city since the days of the Dutch Colonial Government coupled with the arrival of immigrants and the formation of ethnic and religious based villages had factually created vulnerability.<sup>16</sup> The segregation existing since the independence of Indonesia until the end of the New Order Government was left to remain without adequate handling efforts even though the potential of vulnerability had been predictable from the beginning. The enactment of the Law 5 of 1974 on the Principles

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<sup>14</sup> Nicola Frost, 'Adat di Maluku: Nilai Baru atau Eksklusivisme Lama?' (2004) 74 *Antropologi Indonesia*, pp. 1-2.

<sup>15</sup> *Ibid.*, p. 3.

<sup>16</sup> *Ibid.*, pp. 11-12.

of Regional Government reinforced by Law 5 of 1979 on Local Governments that unifies regional governments had further sharpened the sentiments of different groups in Ambon. The enactment of the two Acts had gradually eliminated the local sacred values as the unifying factor of various groups within Ambonese society and it was to be one of the forms of violation against people's customary rights. Both Laws caused Ambon local wisdom implemented in government order had been shifted by the concept formulated by the Central Government. This minimized the power and authority of the country's kings who were previously very authoritative and charismatic in ruling the local governments. This condition, in the conflictual atmosphere, would further exacerbate and increased the risk of friction among the communities because there were no leaders who were traditionally respected by generations. Eventually the sharpening of religious violence occurred in Ambon in 1999 although a number of studies showed that the violence was not solely due to religious sentiments.<sup>17</sup> Many people believed that the human tragedy at Mollucas was systematically triggered by the agendas of military and rulers in Jakarta who wanted to protect their political and economic interests. The intensity of the conflict was maintained by returning Ambon's thugs who had long roamed in Jakarta and brought the issue of rivalry among them to increase the heat at their homeland. The escalation of conflict increased after the actors behind the conflict brought thousands of *Laskar Jihad* (Jihad soldiers) members from Java.<sup>18</sup> The presence of *Laskar Jihad* in Ambon, in the context of State's responsibility, made it obvious that the issue was to be the State's obligation to overcome the problems so that the chaotic situation would not increasingly rampant. However, the absence and silence of the State made dragging on the conflict caused more victims and this could be seen as one of the forms of human rights violations happening in Ambon.

Based on international law a State has an obligation to make reparations when it does wrongful acts. This obligation has become a principle of international law affirmed by the Permanent Court of International Justice (PCIJ) in the often-quoted *Chorzow Factory* case: "[i]t is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form." The PCIJ also established that the ultimate purpose of reparations is to achieve *restitutio in integrum*: "so far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."<sup>19</sup> In the opinion of the International Court of Justice (ICJ), this obligation of a state *vis-a-vis* another state also exists in the relationship between State and individuals. Therefore, this obligation is incorporated into the confines of international human rights law. Once a state's responsibility for acts or omissions amounting to human rights violations has been established, that the state has the duty to repair the harm inflicted against individuals.<sup>20</sup>

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<sup>17</sup> Tamrin Amal Tomagola, Cornelis Lay, Lies Marantika, Ricky Palijama & Yusup Madubun, 'Format Ulang Birokrasi Kota Ambon', in Eddy O.S. Hiarij (ed.) (Ininnawa: Makasar 2008) p. 17

<sup>18</sup> George J. Aditjondro, 'Orang-orang Jakarta di Balik Tragedi Maluku', <http://www.michr.net/orang-orang-jakarta-di-balik-tragedi-maluku.html>, accessed on 31 October 2018.

<sup>19</sup> *Chorzow Factory*, Permanent Court of International Justice, 1928 Ser. A. No. 9, § 47.

<sup>20</sup> International Commission of Jurists, *The Right to a Remedy and to Reparations for Gross Human Rights: Practitioner's Guide, Series 2* (Geneva 2006) p. 9.

This thought leads to a conclusion that the States misconduct or wrongdoing to take appropriate action in Ambon conflict has raised State's responsibility to pursue peace-keeping, peace-making and peace-building. In reconciliation context one of the most urgent and significant things to do is to make reparations to the victims. Reparations can be individual or collective.

## V. Relevance of reparations in international law to the situation in Ambon

Reparations are a fundamental part of international law and are awarded to by States to victims of grave human rights violations within their jurisdiction. Having established that the events in Ambon and the failure of the State of Indonesia to prevent the commission of such violations can give rise to State responsibility, it is necessary here to determine what avenues of remedy should be available or be made available by the State towards victims of the Ambonese conflict. In this regard, United Nations guidelines distinguish, in particular, five forms of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>21</sup> These were replicated in the Orentlicher Principles.<sup>22</sup>

Restitution is the first form of reparation and embodies the general principle of *restitutio in integrum* mentioned above. In essence, restitution aims to restore, as far as possible, the victim's situation and condition as it was before the violation had occurred. The United Nations guidelines elaborate that restitution can take any form as necessary to achieve this goal. For example, it can take the form of restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property,<sup>23</sup> and can even involve restoration to environmental damage.<sup>24</sup>

In practice, this form of reparation would prove the most beneficial for the peoples of Ambon, who had often been forced to migrate away from their native soils to take shelter from the conflict. This also resulted in a loss of income, as farmers had to abandon their plantations, fishermen had to move away from shorelines, and many businesses were closed or ransacked during the violence. Even now, some communities in Ambon have not been able to fulfil their dream of returning to their old territories in fear of renewed violence, or because their old soil had been annexed by other groups during the conflict. Restitution would prove the ideal panacea for the great social, territorial and economic fluctuations brought about by the conflict, although application in its purest sense may be challenging, as this would require significant effort and funds, as well as substantial time, to realise.

Compensation is an alternative to restitution, and aims to instead restore the damage incurred due to the violation nominally. It must be emphasised that in spite of this

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<sup>21</sup> 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 (21 March 2006) A/RES/60/147 ['UN Principles'], § 18.

<sup>22</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) E/CN.4/2005/102/Add.1 ['Orentlicher'], Principle 34.

<sup>23</sup> UN Principles, § 19.

<sup>24</sup> Declaration of Basic Principles of Justice: Victims of Crime and Abuse of Power (29 November 1985) A/RES/40/34, Annex, § 10.

definition, not only purely material damages may be liable for compensation. Reparation must be awarded to all damage that can be valued economically,<sup>25</sup> and should involve pecuniary losses, non-pecuniary damage as well as costs and expenses.<sup>26</sup> Van Boven elaborates that compensation can and should be also awarded, for example, for mental damages, lost opportunities (e.g. employment and education), and income and potential income.<sup>27</sup>

Compensation can be a worthwhile alternative in regards to the Ambon case, although it should be emphasised that the choice to award compensation must not come at the cost of eventual restitution. Compensation is frequently preferred by States as a means of reparation because of its relative simplicity compared to restitution. Where restitution requires intensive effort to restore the previous condition, compensation instead translates the damage into pecuniary awards. It is the most commonly used form of reparation because of its simplicity, but it has drawbacks. Some forms of loss can never be replaced in the form of money. In the Ambon case, this is evident in the cases of land victims had to abandon during the conflict. In Ambon, land is inseparably linked to a community's identity and culture. Land is often regarded as sacred, and many important traditions and communal events are tied to certain locations or objects (totems) found on this land. No amount of money can restore the damage incurred by having lost this territory, which the group often inhabited since the times of its ancestors. As such, compensation should not act as a replacement to restitution, but as a complement. Some authors even put forward that reparation programmes should always prioritise restitution first, and should only resort to compensation if restitution is impossible to provide.<sup>28</sup>

Rehabilitation refers to legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims, while satisfaction encompasses a wide range of efforts such as verification of the facts and full and public disclosure of the truth, apologies, and an inclusion of an accurate record of human rights violations in educational curricula and materials.<sup>29</sup> All of these can be implemented in some way or form to accommodate and honour the victims' plights and experiences in Ambon.

Finally, non-repetition broadly refers to efforts to prevent the occurrence of similar conflicts in the future. The Orentlicher Principles state that "States shall ensure that victims do not again have to endure violations of their rights".<sup>30</sup> Non-repetition is just as crucial for the State of Indonesia to implement, if not more crucial, for the situation in Ambon. After all, in the words of UN Special Rapporteur Van Boven, "it is clear that the preventive approach

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<sup>25</sup> Priscilla B. Hayner, *Kebenaran Tak Terbahasakan* (ELSAM 2005) pp. 292-293.

<sup>26</sup> Dinah L. Shelton & Thordis Ingadottir, 'The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)', Prepared by the Center on International Cooperation New York University for the 26 July – 13 August 1999 Meeting of the Preparatory Commission for the International Criminal Court, § 4.

<sup>27</sup> UN Principles § 20; Theo van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr. Theo van Boven, Special Rapporteur' (2 Juli 1993) E/CN.4/Sub.2/1993/8 ['Van Boven'], p. 345.

<sup>28</sup> Shelton, *op. cit.*, § 2.

<sup>29</sup> Van Boven, p. 346.

<sup>30</sup> Orentlicher, Principle 35.

should receive due priority and emphasis because an ounce of prevention is more effective than a pound of cure.”<sup>31</sup>

Non-repetition is forward-looking and attempts to remove or neutralise factors that can potentially lead to new conflicts, or a resurgence of the same conflict, in the future. In this context, non-repetition can take many forms, depending on the specific situation leading to the violation. States can undertake to repair structural issues like State practices or laws promoting violence or violations, social and economic discrimination and marginalisation, and a lack of available remedies (legal or otherwise).<sup>32</sup> Non-repetition also involves improving control over and accountability of law enforcement officers and military personnel, strengthening the rule of law, and reforming laws or policies which contribute to the impunity of violators.<sup>33</sup>

As also argued above, the conflict in Ambon was brought about by a series of colliding socioeconomic and political factors which had created intergroup suspicion, ideological and religious polarisation, economic inequality, and weakened traditional mechanisms for dispute resolution. These were subsequently aggravated by external factors believed by some to have intentionally provoked the violence in Ambon for ideological or political motives.<sup>34</sup> As such, any effort the Government can make to mitigate these conflict-inducing factors can greatly reduce the chance of a resurgence of violence in the future. While this has been partially undertaken through Law 32 of 2004, which repealed the uniformity of the Soeharto Order and again granted local governments greater autonomy (particularly relevant as this empowered traditional dispute resolution mechanisms), much more can and should be done to definitively minimise the risk of future conflict.

## VI. Collective Reparation as a State’s obligation to victims of the conflict in Ambon

It is clear that violations against human rights and against fundamental freedom, especially massively committed, is naturally impossible to be repaired. In such instances any remedy or redress stands in no proportional relationship to the grave injury inflicted upon the victims. It is nevertheless an imperative norm of justice that the responsibility of the perpetrators be clearly established and that the rights of the victims be sustained to the fullest possible extent.<sup>35</sup> In this light, reparations are an imperative part of doing justice to all victims of gross human rights violations. Not only do reparations aim at restoring the victim’s dignity, but also at promoting peace and reconciliation.<sup>36</sup>

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<sup>31</sup> Van Boven, p. 323.

<sup>32</sup> Siswanto Sunarso, *Viktimologi dalam Sistem Peradilan Pidana* (Sinar Grafika Jakarta 2014), p. 176.

<sup>33</sup> Orentlicher, Principle 35.

<sup>34</sup> See also Trihoni Nalesti Dewi, *op. cit.*, pp. 159-165.

<sup>35</sup> Van Boven.

<sup>36</sup> Theo van Boven, ‘Reparations: a requirement of justice’, in *Memoria del Seminario: El Sistema interamericano de protección de los derechos humanos en el umbral del siglo* (Costa Rica: CDIH 1999) p. 668; Diana Contreras-Garduno, ‘Defining Beneficiaries of Collective Reparations: The experience of the IACTHR’, 4:3 *Amsterdam Law Forum*, p. 42.

Friedrich Rosenfeld states that "collective reparations [are] the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law."<sup>37</sup> From that sense Rosenfeld identifies that there are four elements in collective reparations:

- 1) Benefits which can take place in a variety of different forms. These benefits encompass symbolic (public apologies, memorials) or material reparations (development programmes).
- 2) The beneficiaries are collectives or groups.
- 3) They aim at redressing a 'collective harm' which victims who 'share certain bonds, such as common cultural, religious, tribal, or ethnic roots' suffered.
- 4) The harm resulted from a violation of international law.

In international law the collective reparation is not solely a product of jurisprudence. Both the UN 2005 Basic Principles<sup>38</sup> and the Updated Set of Principles to Combat Impunity<sup>39</sup> have supported the provision of reparations both individually and collectively. Similarly, the Rome Statute of 1999 has also contributed to the "number of victims and the scope" make this form of reparations "more appropriate".<sup>40</sup>

To further discuss the reparation problems, the concept of the victim is very important to be clarified. The 1985 Declaration defines the victims as follows:<sup>41</sup>

[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.<sup>42</sup>

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<sup>37</sup> F. Rosenfeld, 'Collective Reparations for victims of armed conflicts' (2010) *International Review of the Red Cross*, p. 732.

<sup>38</sup> International Commission of Jurists 2006, *op. cit.*, Preamble: "Noting that contemporary forms of victimisation, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively."

<sup>39</sup> ECOSOC, E/CN.4/2005/102/Add.1 (8 February 2005), available at: <http://daccessddsny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> (accessed on 10 August 2017), Principle 32.

<sup>40</sup> Rule 98(3) of the ICC Rules of Procedure and Evidence reads as follows: "The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate."

<sup>41</sup> See and compare with Declaration of Basic Principles of Justice, §§ 1-3.

<sup>42</sup> UN Principles, § 8.

There are some important things that need to be underlined from the passage above. First, the loss can be suffered by an individual or a group (e.g. a customary group). These provisions are essential elements that can be rediscovered in almost all modern instruments relating to remedies.<sup>43</sup> Although heavy damages towards the environment, for example, do not inspire a particular person, the damages can affect all the people who live in the area, and if they happen the community have the rights to demand remedy for the damages suffered. The scope of the definition of victim is extended by the addition in the same paragraph saying:

Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>44</sup>

This is a substantial innovation because the rights of getting reparation is not "directed exclusively to the person who is directly victimized". This addition will be crucial when dealing with cases in which the immediate victims, who are in fact entitled to reparation, are no longer able to claim their rights because they have been killed or disappeared. By extending the rights of reparation to the victim's family and the direct dependents, the perpetrator cannot avoid the fulfillment of the right to reparation simply by 'removing' the victims directly.

Second, the above definition encourages a broad interpretation of what is meant by 'loss'. Beside physical, mental, emotional, and even economic losses (such as loss of income due to an offense) there should be other basis for reparation. This is significant because in practice, most of the losses suffered by victims are also mental or psychological, such as post-traumatic stress disorder. The act of torture that leaves no long-term physical torture (clean torture) like waterboarding nevertheless leaves deep mental injuries. Therefore, we can see that the extent of the concept of 'loss' is a very meaningful development to secure the victims' rights.

Reparation does not just end in the victims. Reparation also has a scope of application beyond the satisfaction and circumstances of the victims themselves. This is the responsibility of the last form of reparation, non-repetition. Non-repetition is a preventive effort that is forward-looking. The positive effect of non-repetition is clear that is if the incident does not happen again the harm and damages suffered by the victims will not be experienced either by the victims or the following generations in the future. This can be more broadly achieved by improving the sociopolitical conditions that have caused or triggered past gross violations, such as segregated social environments or authoritarian governments. The improvement of sociopolitical conditions has doubled positive effects: (a) to eliminate fear and paranoia that the incidents might repeat and (b) to remove the

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<sup>43</sup> See UN Principles, §§ 8, 13; Van Boven ¶ 14 (5-6); Declaration of Basic Principles of Justice §§ 1-2.

<sup>44</sup> UN Principles § 8.

stressors, trauma, or bitter memories of the victims.<sup>45</sup> Other forms of reformation that can be undertaken to avoid repetition are government system reformation, such as legal or constitutional reform or the replacement or dismissal of actors occupying public positions, either partially or wholly (lustration). However, Hayner states that a lustration is a fairly extreme policy and has some disadvantages: the legal protection of those who are dismissed is sometimes unclear and the information on which lustration is based is possibly from past intelligence reports that are often inaccurate or false.

The pro-victim principle can manifest in various forms but the basic values contained therein are always the same that is a remedy should be provided and executed on the ground that the victims are subjects, not objects. In other words, the victims should not be seen as passive persons that need to be helped but they should be viewed as active persons having their own interests, wishes, and dignity who need to be involved to jointly achieve adequate healing. This philosophy should be applied and enforced in the fulfillment of all forms of remedial treatment.

International instruments suggest that the victims should not only be given an active role in the judicial process but also in the context of other remedial efforts. According to Orentlicher, "victims and other social sectors should be given meaningful roles in the design and implementation of remedial programs".<sup>46</sup> This is particularly important in sociopolitical reformation efforts aiming at avoiding the recurrence of the same event in the future. Such sociopolitical reformation was often made on the basis of public consultations and data gathered from the field, for example those conducted by truth commissions. The involvement of victims in the public consultation process will provide a new perspective on sociopolitical weaknesses that deserve improvement in the future.<sup>47</sup> In short, involvement in the remedial process is one way to avoid objectifying victims and ensuring their participation in remedial mechanisms.

Although the concept of collective reparation remains unclear in international law it is a reasonable choice in the context of reconciliation of Ambon. Several attempts to provide collective compensation for the victims suffering or to help children whose parents were killed during the conflict had been committed shortly after the conflict there was no a single comprehensive reparation program specifically addressed to survivors, victims and their families. About the victims' reparation rights the facts in the field is still very limited compared to the international standards.

According to the international law each state is required to provide an effective remedy, including a reparative policy or program for post conflict victims. In Resolution 60/147, for example, the General Assembly of the United Nations emphasized the

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<sup>45</sup> See Carla Ferstman, Mariana Goetz dan Alan Stephens (ed), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, Leiden 2009), p. 55.

<sup>46</sup> Orentlicher, Principle 32: "victims and other social sectors should be given meaningful roles in the design and implementation of the remedial programs"

<sup>47</sup> Orentlicher, Principle 35: "Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society."

importance of "respecting the rights of victims to get healing"<sup>48</sup> In international law, broadly speaking, remedies for post-conflict victims include the right to know,<sup>49</sup> right to justice,<sup>50</sup> and the right to reparations. While the reparative policy itself includes the right to restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition,<sup>51</sup> as discussed above. It should be emphasized that all remedial procedures provided by the State must be effective, non-discriminatory and open to anyone in need of a remedy.<sup>52</sup>

Factually it is hard to implement reparations in practice. The follow-up actions by the State as recommended by the truth commission were still far from the victims' expectation.<sup>53</sup> Lack of attention given to post-conflict victims also occurred to the victims of the Ambon conflict over years, especially regarding with remedy and reparations. There are many victims that should be given remedial treatments in order to reduce their burden of life and even to bring them back to their normal life as before. To ensure that victims and their families had accesses to reparations because of the tragedies that occurred during the conflict and to confirm the rule of law in Indonesia central and local authorities should take full and effective reparations measures in accordance with international human rights law and standards as a priority agenda. The program should be designed through consultation with victims as well as other relevant groups.

The impact of the conflict had increased poverty and unemployment due to the cessation of a lot of economic activities. The number of abandoned children increased whereas education withdrawal happened because of the shortage of teachers beside a lot of schools/colleges were burned and destroyed. All of these impacts affect the quality of human resources in the future. The non-functioning of public service facilities such as public health centers that are destroyed and the lack of supply of medicines with the disruption of transportation are also of particular concern.<sup>54</sup> The situation described above shows the importance of collective reparations that can together be felt by all community groups as the victims of the conflict.

The handling of refugees and relocation that were instantly done regardless of their impacts had led to other problems. This resulted sharp segregation matters. At the present time to know Ambonese's religious affiliation can be simply done by knowing where they live. This segregation factually creates prejudices and cultural isolation so that the intensity of exclusivity of each side remains and the friction that arises in the midst of society often

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<sup>48</sup> Declaration of Basic Principles of Justice, Preamble para. 11: "*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law (...)"

<sup>49</sup> Orentlicher, Principle 2.

<sup>50</sup> *Ibid.*, Principles 1 and 19.

<sup>51</sup> Declaration of Basic Principles of Justice, Annex, § 18.

<sup>52</sup> *Ibid.*, §§ 2(c) and 12.

<sup>53</sup> Johanna Herman, 'The Right to Reparation in International Law for Victims of Armed Conflict' (2015) 33:2 *Nordic Journal of Human Rights*, pp 190–191.

<sup>54</sup> KPP HAM, 'LAPORAN Komisi Penyelidik Pelanggaran Hak Asasi Manusia dan Mediasi di Maluku', available at: <http://www.oocities.org/toelehoe/komnasham290305.htm> (accessed 31 October 2018).

get mass justification.<sup>55</sup> In the context of collective reparations, to overcome the existing segregation matters can be done by building heterogeneous and integrative-inclusive settlements, resulting in a melting social life within an intermingling community between two different religious groups. In this way it can minimize the cultural tensions that often arise. If this is difficult, to build a public space that is accessible for both communities of different religious affiliation might be a reasonable alternative option.

The weakness the of reconciliation in Ambon was caused by the fact that it was not based on cultural process and did not directly involve the conflicting parties, namely the grassroots of Muslim and Christian groups whereas the source of conflict was the sentiment of living values of the two religious groups or communities.<sup>56</sup> Through this formalistic reconciliation process, the conflict resolution agreements were more abstract and 'black on white'. A top down approach, especially repressive or security approaches, in reconciliation efforts at Ambon would certainly not meet expectations. This was because the conflict had a very complex dimensions so that the resolution efforts could not only be limited to merely efforts of violence stopping and spin-offs but it required social reconstruction and strengthening of local identities.<sup>57</sup> Thus any reconciliation that was based on the initiatives of elite officials would become difficult to implement. Non-involvement of the conflict actors made them apathetic and did not care about the the peace agreements because they were not contextual.<sup>58</sup>

The ideal collective reparation is to involve community participation and be undertaken based on full initiative of the grassroots who still adhere to local customs and be aware of the importance of local culture in safeguarding and ensuring the integrity of society. When the role of religions are incapable to resolve conflicts local wisdoms will effectively unify dispersed society because of religious diversity". These local wisdoms are rooted and usually not only socially oriented but also sacred-oriented so they would be more effective in resolving conflicts because they are easily accepted by the communities and avoid latent or continued conflicts. A local wisdom is indeed a culture that refers to cultural richness and grow and develop in society is recognized and trusted as an important element that is able to strengthen social cohesion among citizens and it will be a universal language for the conflicting parties.<sup>59</sup> A culture must beyond over religion so that every cultural process and recognition of cultural values in conflict resolution should be put forward. Therefore, the involvement of custom leaders and other cultural actors is a key precondition that must be put forward.

A very important collective reparation is a public policy that affirms the whole process of community-based reconciliation so as to avoid the denial because there is no space for

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<sup>55</sup> Suharno, Samsuri & Iffah Nur Hayati, 'Pengembangan Model Resolusi Konflik Untuk Masyarakat Multikultural (Studi Implementasi Kebijakan Resolusi Konflik di Sampit, Poso, dan Ambon)', available at: [eprints.uny.ac.id/22690](http://eprints.uny.ac.id/22690) (accessed 31 October 2018).

<sup>56</sup> *Ibid.*

<sup>57</sup> Yunus Rahawarin, 'Kerjasama Antar Umat Beragama: Studi Rekonsiliasi Konflik Agama di Maluku dan Tual', available at: <http://ejournal.radenintan.ac.id/index.php/KALAM/article/view/451> (accessed 31 October 2018).

<sup>58</sup> Suharno *et al.*, *op.cit.*

<sup>59</sup> Hendry Bakri, 'Resolusi Konflik melalui Pendekatan Kearifan Lokal Pela Gandong' (2015) 1 *The POLITICS*, p 55.

state involvement in rule enforcement of the peace treaty. Therefore, a reconciliation process that is "wrapped" in a public policy, such as Regency or City or Province Regulations is needed. In doing so, reconciliation by emphasizing identity recognition and existence of one party against another that is culturally done must involve the State to ensure the enforcement of the recognition in real terms in a juridical enforcement framework. The agreements sourced from community initiatives that are based on religious and cultural values will be the main material or source in formulating public policies. The public policies are then implemented by directly inviting participatory and inclusive manners of the parties involved and the main actors. The Implementation could be in the form of law enforcement, inclusive education, equal socio-economic development and minimized socio-economic-political disparities between the parties.

## VII. Conclusion

An ideal victim-based reconciliation model should, in addition to prioritizing the initiative and willingness of the conflicting parties itself that is in accordance with the values believed to allow the parties to recognize each other's existence and be able to co-exist peacefully, include the Government's efforts to facilitate the identification of material losses because of the conflict, then formulate reparations in the form of compensation and restitution which includes also law enforcement of criminal acts that cause physical, psychological, or loss of life.

Seeing the description above it can be concluded that reconciliation in Ambon had not focused on reparations as one of the keys of conflict resolution and reconciliation. For the fulfillment of reparation for the victims, both individuals and communities, as well as the Government of Ambon City, should reform and revitalize the capacity of the institutions involved in accordance with local wisdoms. Ambonese's values and local wisdoms should have a central role in the reparations process by increasingly strengthening local customs and institutions in the governmental and societal structures.

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