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Addressing the Past: Reparations for Gross Human Rights Abuses

Pablo de Greiff, International Center for Transitional Justice

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Introduction

While a great deal of attention has been paid to what countries that have undergone transitions to democracy or at least out of conflict have attempted to do *against perpetrators* of past abuses, much less attention has been paid to these countries' efforts to do something *on behalf of the victims* of such abuses. Clearly, both kinds of efforts, the penal and the reparative, can be considered elements of justice, yet an important dimension of the latter has not received sufficient systematic attention. There is a long history –and an extensive literature—on intra-state reparation in the aftermath of war, and a growing history –and accompanying literature—on judicial remedies, including compensation for relatively isolated cases of human rights violations. However, there is very little systematic information available on massive reparations programs. This is surprising, for most of the recent transitional processes have given some

consideration to programs of reparations that seek to make up, in some way, for the harms endured by some members or sectors of society.

The focus of this paper is therefore, not the judicial resolution of sporadic cases of rights violations, but rather, the types of ‘programs’ that various transitional or post-conflict countries have set in place in order to give some measure of redress to a large universe of victims. The paper first provides an overview of recent developments in the field of transitional justice (section A). Section B provides a description of reparations processes with a specific focus on some of the difficulties associated with the absence of a criterion of reparative justice for the massive cases, then attempts to articulate an appropriate criterion and proposes a taxonomy of reparation efforts. Section C will analyze some of the trade-offs that always accompany the choices between different reparations measures and address some important questions in relation to the financing of reparations. The final section will summarize the main arguments of the paper and offer some general policy recommendations.

(A) Historical Overview

1. Emergence and evolution of transitional justice mechanisms

Transitional justice measures have been tried long enough to have gone through significant variations. These variations correspond roughly with historical periods, but are more properly thought of as developmental rather than temporal stages. In very rough terms, one can identify the following approaches to transitional justice issues.

In the aftermath of World War II, under the influence of the Nuremberg Trials and the guidance of the various international law instruments designed to prevent a repetition of the horrors of the Holocaust and the War itself, the international community adopted a retributivist position

towards human rights abusers. The message seemed to be that there was no point in trying to escape, for perpetrators would be sought, apprehended, tried, and punished. However, this approach requires strong international cooperation, and alas, the post-war consensus rapidly gave way to the Cold War, which undermined international cooperation on justice and human rights related issues, making countries, especially the major powers, more prone to adopt 'realist' positions in the international arena.

By the early eighties, not surprisingly, a new approach to transitional justice on the part of the international community seemed to take hold: this approach appeared to be geared primarily towards regime stabilization –an objective which happened to dovetail nicely with Cold War politics *and* with the very real difficulties generated by the policy of trials and punishment. Thus, the policy of pardon and oblivion gained some defenders. Granted, even its supporters—other than the perpetrators who stood to gain from it—understood that this was a compromise, acceptable only because of existing political constraints, including a balance of power between the different parties radically different from the situation in Germany after the war. However, foregoing not only criminal justice, but the very possibility of investigating past misdeeds, was seen (briefly) as an admissible trade-off for the sake of stabilizing incipient democracies. The international community did not oppose, and in many ways supported in various instances, the policy of pardon and oblivion such as the ample amnesty law in Brazil in 1979, which paved the way to the easy exit from power of the military in 1985; the Naval Club agreement in Uruguay in 1984 which reportedly included a decision not to press charges against violators of human rights abuses;¹ or the 'due obedience' and the 'Final Stop' decrees which put an end to the attempt to try the Argentinean military in 1986, and 1987.²

However, this is an incomplete account of developments in transitional justice, for it focuses on attitudes towards transitional justice on the part of the international community, that is, the community of nation states that are subject to interpretations of state interest and highly susceptible to considerations of regime stability, balance of power, and sovereignty. Other actors, among which both national and international NGOs were very important, rarely gave up the hope of seeing some form of justice done even if criminal justice could not be achieved. In this sense, the fact that criminal justice efforts stalled for a while may have acted as an incentive for NGOs to push for measures of justice other than criminal prosecutions. Be that as it may, the third identifiable approach to transitional justice issues is one that focused heavily on truth commissions.³ Thus, the experiences with truth commissions in Argentina, Chile, and El Salvador became crucial foundations of transitional justice, which led to the establishment of other such commissions in more than twenty countries around the world.⁴

Finally, the abiding promises of justice expressed in different post-World War II international law instruments helped usher in a fourth and more complex approach to transitional justice once the Cold War finished. The adoption of the Rome statute of the International Criminal Court has given new wind to the prosecutorial component of transitional justice, especially at the national level. In this perspective, criminal justice is not the antagonist of transitional justice, but one of its components. Alongside criminal justice efforts, truth-telling efforts continue unabated, and, given cross-border learning experiences on the part of each successive truth commission, it is no wonder that their recommendations have become increasingly complex and comprehensive over time. Comparing the reports of the different truth commissions in the last twenty-five years, one cannot justifiably claim that there is a smooth, ascending curve, especially in terms of quality, yet a trend towards greater depth, breadth and

thoroughness can be identified. So, it is now common for transitional justice measures to be thought in terms of a range of measures that include, minimally, criminal justice, truth-telling, institutional reform, and reparations.

Recent interest in reparations emerged as a result of this trend towards increased complexity in transitional justice measures, with both negative and positive underlying incentives.⁵ The remainder of the paper will focus on reparations, paying almost exclusive attention to measures of material compensation, not for lack of interest in symbolic measures, but for reasons of space.⁶ Before giving a brief overview of recent experiences with reparations *efforts* involving large numbers of beneficiaries –as opposed to reparations benefits stemming from the adjudication of relatively isolated cases—a few remarks about the history of the practice are in order. I distinguish between reparations *efforts* and reparations *programs* on the ground that the latter term should be reserved to designate initiatives that are designed from the outset as a systematically interlinked set of reparations measures; most countries do not have reparations programs in this sense.⁷

2. A short history of reparations

The idea of providing reparations to the victims of various sorts of harms is of course not new. Aristotle, in book V of the *Nicomachean Ethics*, articulates what was surely not a novel view even at the time, according to which ‘rectificatory justice’ requires the judge to “equalize by means of the penalty, taking away from the gain of the assailant.”⁸

However, the contemporary practice of providing reparations for victims of human rights violations has its more immediate roots both in national torts legislation –the idea of repairing harms is part and parcel of all established legal systems—and in inter-state, post-bellum

reparations, which themselves have a long history. Grotius, in his 1625 *On the Law of War and Peace*,⁹ gives expression to a view of inter-state reparations, without taking himself to be articulating a new obligation. In the domain of practice, not of mere texts, the Treaty of Westphalia of 1648 already includes reference to reparations, in particular to restitution. The conclusions of the wars of 1830, 1870, and, famously, of World War I, included provisions for extensive reparations paid for by the defeated parties.

But it is the reparations paid by Germany after the Holocaust that constitute a watershed in the history of reparations. Although they included elements of the inter-state paradigm in the form of transfer of resources from one state (Germany) to another (Israel), these reparations measures also included novel elements:¹⁰ first, they resulted from negotiations that included not only state actors, but what would come to be known as non-governmental organizations (NGOs); and crucially, it was understood that the provision of benefits to individual victims was an essential aspect of the effort.¹¹

Since then, in the wake of the different waves of ‘democratization’ and of transition out of conflict, the obligation to provide reparations to victims has come to be understood to obtain also with respect to the victims of *intra*-state conflicts and violence. In the next section, I will examine how this obligation has been formulated and implemented both at the international and the domestic levels.

(B) International Strategies and Approaches: rationale, objectives and description¹²

1. Reparations and International Law

From the standpoint of international law, the right to reparations is one side of a more general right to a remedy –the other being the procedural right to criminal justice—contained in global

and regional human rights treaties, as well as in humanitarian law instruments and in international criminal law. This emerging consensus is grounded, in part, on the general principle that all violations of international law entail responsibility, that is, a secondary obligation to repair the violation of a primary obligation,¹³ in the present case, international humanitarian and human rights law prohibitions such as the prohibition of genocide, crimes against humanity, war crimes, torture, extra-judicial executions, etc...

International human rights instruments express this principle in many diverse ways. Article 8 of the Universal Declaration of Human Rights talks about “effective remedies.”¹⁴ Article 10 of the American Convention on Human Rights talks about “adequate compensation,” Article 63 about “fair compensation,” and Article 68 about “compensatory damages.”¹⁵ Article 9 of the International Covenant on Civil and Political Rights includes vocabulary about “an enforceable right to compensation,”¹⁶ Article 14 of the Convention against Torture speaks about “fair and adequate compensation including the means for as full rehabilitation as possible,”¹⁷ and Article 50 of the European Convention on Human Rights about “just satisfaction to the victim.”¹⁸

This, of course, does not fully settle the issue. What do the expressions “effective remedies,” “fair and adequate compensation,” and “just satisfaction” mean, precisely? The criterion of justice in reparations that underlies most national and international law instruments is *restitutio in integrum*, full restitution, the restoration of the status quo ante, or when the harm is such that it is literally impossible to go back to the pre-harm situation, compensation in proportion to harm.

This criterion of reparatory justice is unimpeachable for relatively isolated cases of human rights violations. It is meant to neutralize the effects of the harm on the victim, and to prevent the perpetrator from enjoying the spoils of crime. The problem is that international

practice suggests that it is virtually impossible to satisfy this criterion in the massive cases of abuse. Most ‘really existing’ reparations programs have failed to meet this criterion of justice. It would be too simplistic to conclude that therefore these programs have simply been ‘unfair,’ for even if true, this judgment would not help distinguish between earnest efforts to provide reparations to victims of human rights violations and those that have been a sham.

It is a significant fact that virtually all reparations programs have failed to satisfy the criterion of *restitutio in integrum* for morality and law are not supposed to generate obligations that are impossible to fulfill. This could count in favor of revising the standard of justice for massive human rights abuses. But the idea of articulating a standard of justice for the massive cases should not rest on the observation that the familiar criterion of justice in reparations has rarely been met. Judgments about the feasibility of paying certain costs are usually of the *ceteris paribus* type, and perhaps in transitional or post-conflict situations it makes little sense for all other things to remain equal; absent a budget surplus, it will be impossible to engage in aggressive reparations for victims leaving all other state expenditures untouched.¹⁹

However, the near impossibility of compensating victims in proportion to the harm they have suffered—and the blow to victims’ expectations when they are led to believe that this is what they are entitled to but never receive—are not the only reasons to seek a criterion of justice suitable to massive cases. Ultimately, there is a difference between, on the one hand, awarding reparations within a basically operative legal system in relatively isolated cases of abuse, and on the other, awarding reparations in a system that in some fundamental ways needs to be reconstructed (or, as in some countries, built up for the very first time), precisely because it either condoned or made possible systematic abuses. In the former case it makes sense for the criterion of justice to be exhausted by the aim to make up for the *particular* harm suffered by the

particular victim whose case is in front of the court. In cases of massive abuses, however, an interest in justice calls for more than an attempt to redress the particular harms suffered by particular individuals. Whatever criterion of justice is defended must be one that has an eye also on the preconditions of reconstructing the rule of law, an objective that carries a public, collective dimension.²⁰

2. Goals of Reparations Programs

By examining in detail reparations programs and the history of their design, enactment, and implementation, one is able to reconstruct an account of how these aim at bringing some sort of justice. Here I am not attempting to derive an ‘ought’ from an ‘is,’ to derive a normative account from observation. Ultimately, the move is reconstructive; it constitutes an effort to reconstruct the aims that actual reparations programs may be said to pursue. Arguably, these programs have pursued two goals that are intimately linked to justice: the first is to provide a measure of *recognition* to victims. The crucial point here is that the benefits provided by the program are not meant to solidify the status of victims *as victims*, but rather, *as citizens*, as bearers of rights which are equal to those of other citizens. The benefits become a form of symbolic compensation for the fact that rights that were supposed to protect the basic integrity, possibilities, and interests of citizens were violated. It is the violation of equal rights that triggers the provision of compensatory measures. And it is precisely because the benefits are given in recognition of the (violated) rights of citizens that this general aim of recognition is related to justice. Justice in a state governed by the rule of law is a relationship among citizens, that is, among the bearers of equal rights. The violation of this status is what generates the obligation to provide compensatory benefits. This is the first way in which reparations contribute to the achievement of justice: reparations are themselves a form of recognition of the status of

individuals as citizens, i.e., as rights bearers. They are, in a sense, a material form of recognition *owed* to fellow citizens whose fundamental rights have been violated. There is another way in which reparations contribute to justice. It is one aspect of the close relationship that binds the different elements of transitional justice together, and specifically, of the ways in which reparations complement other transitional justice processes. I will return to this point below, in talking about the ‘integrity’ or ‘coherence’ of reparations programs. But, in a nutshell, one can say that reparations contribute to justice not only because they complement transitional justice measures generally, but because they do so in a particular way, namely by helping to keep those other measures from fading into irrelevance for most victims.

One important consequence that flows from this conception of reparations is that the proper metric for assessing the magnitude of the compensation owed, in fairness, to victims stems directly from the very violation of rights held in common by the citizenry, and not from each individual’s particular position prior to the violation. In other words, the fundamental obligation of a massive reparation scheme is not so much to return the individual to his or her status quo ante, but to provide a reliable indication of the fact that the successor regime is committed to respect the equality of rights of all citizens. This clearly involves both a retrospective and a prospective element. Retrospectively, the benefits must be sufficient in magnitude to constitute an adequate recognition of the perceived seriousness of the violation of the equal rights of fellow citizens. Prospectively, and by the same token, the magnitude of the benefits must be sufficient to signal the successor government’s intentions to behave differently in the future.

The second important consequence that flows from this conception of the ends of reparations is that the design and implementation of reparations programs calls for participation

of those whom the program seeks to recognize. Recognition is not something that is simply bestowed, independently of whether the person on whom it is bestowed feels thereby adequately recognized. This is particularly true given that what is sought is to recognize beneficiaries as the bearers of equal rights. A paternalistic foisting of benefits without consultation or participation on the part of recipients is likely to undermine the goal to establish the beneficiaries in the eyes of others or in their own eyes as citizens with equal rights. Hence, civil society should be given an important role in the design and implementation of reparations programs. Accomplishing this is no easy task for several reasons, two of which are salient. First, in discussions about the mobilization of public resources the voice of victims is of course important, but not solely determinative, given that investments in reparations compete against other perfectly legitimate state expenditures such as infrastructure, development, health, and education (a point to which I shall return). Second, it is not uncommon in transitional and post-conflict societies to find that victims and their representatives have concentrated on achieving other measures of justice, and therefore, their expectations about reparations turn out to be as fluid and uninformed as those of other parties to the discussion. Participatory processes, in conclusion, have to be designed in such a way that they contribute to the formation of reasonable expectations on everyone's part.

The other main goal that can be attributed to reparations programs –again, one related to justice—is to make a (modest) contribution to the fostering of trust among citizens, and particularly, between citizens and State institutions. Here, it goes without saying, the relevant sort of trust is not the thick kind which holds friends and relatives together, but rather, the very general kind that can exist even among strangers and that stems from commitment to the same general norms and values. The point is that a well-crafted reparations program is one that provides an indication to victims and others that past abuses are taken seriously by the new

government, and that it is determined to make a contribution to the quality of life of survivors. Implemented in isolation from other justice initiatives such as criminal prosecutions, and, primarily, truth-telling, reparations benefits might be counterproductive and be perceived, as will be further elaborated below, more like a payment in exchange for the silence or acquiescence of victims and their families. On the other hand, if integrated into a comprehensive transitional justice policy, reparations might provide beneficiaries with a reason to think that the institutions of the state take their well-being seriously, that they are trustworthy. To the extent that reparations programs may become part of a political agenda that enjoys broad and deep support, they might even have a positive impact not just on ‘vertical trust,’ i.e., trust between citizens and the institutions of the state, but also on ‘horizontal trust,’ i.e., trust among citizens.

Like recognition, trust is not something that it is merely desirable; it is also both a condition and a consequence of justice. Absent totalitarian supervision, legal systems cannot but rely on the trust of citizens at each level of their operation, starting with the trust that is necessary for citizens to report crime to the authorities. A well-functioning legal system is capable of catalyzing citizens’ trust, and also, probably, the trust that citizens have for one another, not least because law stabilizes expectations, creates predictability and lowers the risks of trusting others.

In a nutshell, then, the claim is that reparations can play a role in fostering the rule of law in transitional and post-conflict situations for two main reasons. First, reparations may provide recognition to victims, and, more to the point, recognition of their *rights*. Second, reparations can increase the level of civic trust, particularly of trust in new institutions. This is of importance if the rule of law is going to take hold not merely as a set of ideas in texts, but as a set of ruling practices. However, one should emphasize that the contribution that transitional or post-conflict justice measures –including reparations—can make will always be modest. Changing

social practices and relations is always a slow process, and no given measure can be expected to transform them on its own. Furthermore, the claim is obviously not predictive in character: whether reparations efforts make the mentioned contribution or not is an empirical issue that depends upon many factors.

3. Designing and Implementing Reparation Measures

After these normative considerations I will proceed by describing some aspects of the current practice of designing and implementing reparations measures.

Ongoing legal efforts to specify the obligation to provide reparations have led to a familiar classification of the different forms reparations can take under international law. These include:

- *Restitution*, which aims at reestablishing the victim's *status quo ante*. Measures of restitution can include the reestablishment of rights, such as liberty and citizenship, and the return of property.
- *Compensation*, which is the essential and preferred component in reparations, especially at the international level. Compensation is usually thought to involve providing an amount of money deemed to be equivalent to every quantifiable harm, including economic, mental and moral injury.
- *Rehabilitation*, which includes measures such as necessary medical and psychological care, along with legal and social support services.
- *Satisfaction and Guarantees of Non-Recurrence*, which are especially broad categories that include such dissimilar measures as the cessation of violations, verification of facts, official apologies and judicial rulings seeking to reestablish the dignity and reputation of the victims, full public disclosure of the truth, searching for, identifying and turning over

the remains of dead and disappeared persons, the application of judicial or administrative sanctions for perpetrators, as well as measures of institutional reform.²¹

In the design and implementation of massive programs, however, the main categories distinguish between material and symbolic benefits, and their individual or collective distribution. These two pairs of categories are not meant to substitute for the legal ones. The legal categories give expression to a wider understanding of the term reparations; by including judicial measures, truth-telling, and institutional reform, among others, the legal understanding of the term expresses the capacious notion of legal ‘remedies.’ While such a broad understanding of the term invites coordinating these various measures, in practice, those who are entrusted with the responsibility to design massive reparations programs have tended to appeal to the narrower understanding mentioned before, and have conceived of their role as that of crafting a program that provided benefits to victims directly, thereby distinguishing in practice, reparations benefits from the reparatory effects of other measures.

It would be impossible, in a short paper such as this one, to summarize the complex reparations efforts undertaken by different countries.²² I will rather concentrate on the more useful attempt to provide a taxonomy of these efforts, one that in its basic categories presents some of the main challenges faced in undertaking reparations efforts.

a. Scope. Reparations efforts can have greater or lesser scope according to the total number of beneficiaries they cover. Using this as a classificatory criterion, one could order different reparations programs in the following way:²³

- Brazil: 280 beneficiaries.²⁴
- Chile: close to 6,000 beneficiaries.²⁵
- Argentina: 13,455 beneficiaries.²⁶

- US Japanese-American reparations: more than 82,000.²⁷
- Germany: in the hundreds of thousands.²⁸

Understood in this manner, there is no inherent merit in a program having greater scope. The fact that one program provides reparations for a larger total number of people than another may simply be indicative of a very large universe of potential beneficiaries. In this respect, it is important to distinguish a program's scope from its 'completeness.'

b. Completeness. This refers to the ability of a program to cover, at the limit, the whole universe of potential beneficiaries. There is no existing program that satisfies this standard in full, not only due to the difficulties associated with determining, as a matter of principle, what constitutes the full set of *potential* beneficiaries of a program of reparations. Part of the issue here refers to the catalogue of rights whose violation should lead to reparations, which will be addressed below. There are two other types of consideration that have an impact on a program's completeness. The first has to do with evidentiary standards: if the evidentiary bar is set very high, the program will exclude many people who otherwise deserve to receive benefits. Different programs have had to grapple with this issue, including the German Holocaust reparations, and various programs in Argentina. The second sort of consideration that affects a program's completeness has to do with structural issues such as the outreach efforts undertaken to publicize the existence of the program, and the procedural hurdles associated with accessing it, including narrow application deadlines, closed lists, personal application requirements, and others. It goes without saying that completeness is a desirable characteristic in a reparations program, and that the mere availability of benefits will not guarantee it. Rather, strong commitment towards completeness is essential, particularly considering that a history of both

marginalization and abuse might lead large numbers of potential beneficiaries, including entire groups, not to apply for the benefits available through a reparation program.

c. Comprehensiveness. A related category is the effort's comprehensiveness, which has to do with the distinct types of crimes, or harms it tries to redress. While there is growing consensus in international law about reparations, the boundaries of this obligation remain fuzzy. For instance, there seems to be emerging agreement in international law about the obligation to provide reparations for disappearance and death. But there is much weaker or no consensus on whether the obligation extends to forced displacement. The situation is still more complicated in practice. For instance, 'really existing' reparations programs notoriously underrepresent the international law consensus on the obligation to reparation in cases of torture. Most bodies that have considered the possibility of providing reparations for torture have ended up refraining from doing so, on the basis of evidentiary difficulties. Programs tend to provide reparations for torture whenever the evidentiary questions can be sidestepped by folding torture into easier-to-prove categories such as illegal detention, and/or when the alleged torture has led to permanent injuries.²⁹

In general, and perhaps not surprisingly, most reparations efforts have concentrated on a fairly limited (and traditional) catalogue of civil and political rights, leaving the violation of other rights largely unrepaired. Obvious exclusions of various sorts impinge on the reparations efforts' comprehensiveness. In a context in which distinct forms of violence were perpetrated against multiple groups, excluding from benefits either some of the worst, or some of the most prevalent, forms of violence or some of the targeted groups automatically reduces the reparations' comprehensiveness, and as a consequence, its completeness.

I will not attempt a precise ranking of past or current reparations programs along the axes of comprehensiveness or completeness, but rather indicate the types of crimes that different reparations efforts have tried to redress, and make some comments on classes of victims that they may have excluded.

- Brazil: to the extent that this effort was intended to provide reparations only to the victims of disappearance and death for “non-natural causes in police or similar premises”³⁰ – notwithstanding how expansively this last criterion was understood by the commission in charge of the program—the Brazilian effort left out important categories of victims including those illegally detained, tortured, and the exiled.

- US: Japanese-American Internment.³¹ The 1988 Civil Liberties Act, which gave rise to reparations for the surviving Japanese-Americans interned during World War II, compensated them in an undifferentiated way for the ‘internment.’³² This would place the Act on the lower end of the spectrum of comprehensiveness, although, interestingly, given the nature of the phenomenon calling for redress –the forced internment of an entire ethnic group—as well as aggressive outreach efforts and years of mobilization on the part of civil society organizations, the efforts rank relatively high in terms of completeness: virtually all eligible beneficiaries, as defined by the Act, were located and received their benefits. However, there were notable exclusions: the Act targeted Japanese-Americans who were US citizens or permanent residents at the time of the internment, which of course precluded many people who were interned, but who were neither citizens nor permanent residents,³³ as well as those who were not of Japanese ancestry but were interned with their Japanese-American spouses.³⁴

- Chile.³⁵ Chile has engaged in a series of efforts to redress different types of crimes by means of individual legislative initiatives. Initially, a good part of the attention of these

reparatory efforts was focused on the crimes covered by the mandate of the Truth and Reconciliation Commission, namely, “human rights violations under the previous dictatorship that resulted in the death of the victims.” This is to say that the relevant categories of crimes leading to reparations were deadly political violence, political executions, and disappearance while in detention.³⁶ Ancillary initiatives were taken in order to provide different forms of assistance –not, strictly speaking, reparations—to returning exiles;³⁷ to the less than 400 political prisoners still in jail after the Pinochet regime came to a close (“Cumplido Laws”); to those that had been dismissed from their jobs for political reasons;³⁸ and to those excluded from agrarian reform or those who had been expelled from their land.³⁹ One noteworthy plan undertaken by the Chilean government was a comprehensive health care program for victims of political violence (PRAIS), which makes available to them medical services, including mental health care, through the national health care system, waving co-payments and giving victims priority in the delivery of services.

For decades, the huge omission in Chile’s reparations efforts was the exclusion of victims of the most prevalent forms of violations during the regime, that is, illegal detention and torture. Recently, this omission received attention from a Commission appointed to examine precisely these crimes, which submitted at the end of 2004 a comprehensive report including recommendations on reparations. The recommendations, accepted by the government, will give victims of these crimes a monthly pension and other symbolic reparatory measures.

•South Africa: the SATRC made far-reaching recommendations for the reparation of the victims of apartheid. A “victim,” according to the Act, was someone who had “suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or substantial impairment of human rights, (i) as a result of a gross violation of human rights; or (ii) as a result

of an act associated with a political objective for which amnesty has been granted.” A gross violation of human rights, in turn, was defined as “(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit [killing, abduction, torture or severe ill-treatment].”⁴⁰ At least in part because of the nature of the Apartheid system, a system that involved controlling fundamental aspects of the lives of the majority of South Africans for essentially repressive purposes, the point has been made repeatedly that the conception of ‘victims’ adopted by the Act was excessively narrow, and that therefore, important categories of potential beneficiaries had been entirely left out of consideration.⁴¹ Needless to say, a repressive system that affected so many aspects of people’s lives –including, of course, their standard of living—can rightly be said to have made victims of virtually all those subject to it. While true, this is not particularly helpful from the standpoint of reparations. This general sense of victimhood is best addressed through distributive justice policies leading to the redress of structural imbalances, something that reparations programs are not in a position to do. Having said this, arguably, the recommendations left out of consideration important categories of victims: there were discussions within the Truth and Reconciliation Commissions about whether to repair combatants who died during military actions in situations that did not constitute clear violations of international humanitarian law; or victims of the routine violence that accompanied the operation of the social engineering aspects of apartheid, such as people who died not in political demonstrations, but, for example, in forced removals; or people who were detained under provisions of the state of emergency. None of them were eligible for reparations as a class, and arguments can be made that they should have.⁴²

•Argentina.⁴³ There is no such thing as a reparations program in any strict sense of the concept in Argentina. Instead, there have been several initiatives, each stemming from a separate piece of legislation and covering a distinct category of victims. The main laws cover the following sets of crimes: disappearance;⁴⁴ arbitrary detention, and grave injuries and death while in detention.⁴⁵ A recent 2004 law redresses categories of victims that had been overlooked by the initial reparations laws,⁴⁶ namely persons who were born while their mothers were illegally detained; minors who remained in detention due to the detention or disappearance of their parents for political reasons or those who remained in military areas. The law redresses also those persons who were the victims of ‘identity substitution,’ the term used in Argentina to refer to cases of children of disappeared parents and then registered as the legitimate children of other families, in many cases as the children of the military or security personnel who stole them from their biological parents.

•Germany: Holocaust Reparations. The very broad categories used by the German reparations laws, namely, (1) harm to life, body, and health, (2) harm to freedom, (3) harm to possessions and assets, and (4) harm to career and economic advancement, make this the most comprehensive program in our sample. However, and once again to emphasize the difference between ‘comprehensiveness’ and ‘completeness,’ while arguably, the very generality of the categories used by the German reparations laws cover a good number of the more narrowly defined crimes that have become common today and hence make the German efforts quite comprehensive, this does not mean that they were ‘complete.’ Indeed, the obvious exclusion of important categories of claimants such as those who did not fulfill the law’s residency requirements –which meant most people persecuted outside Germany who remained in their native countries—or the Roma, or forced laborers, among others, illustrate the ‘incomplete’

nature of the effort and became one of the most frequent criticisms of these laws. Some of these groups have been redressed in later legislation.⁴⁷

All things considered, comprehensiveness is a desirable characteristic. It is better, both morally and practically, to repair as many categories of crime as possible; leaving important categories of victims unaddressed virtually guarantees that the issue of reparations will continue to be on the political agenda, which means it will remain the target of legislative or bureaucratic give and take. This may undermine the stability and reliability of reparations agreements, as the Chilean case exemplifies.

d. Complexity. Whereas comprehensiveness relates to the types of crimes reparations efforts seek to redress, complexity refers to the ways in which the efforts attempt to do so. Thus, rather than focusing on the motivating factors, complexity measures the character of the reactions themselves. A reparations program is more complex if it distributes benefits of more distinct types, and in more distinct ways, than its alternatives. Thus, at one end of the spectrum lie very simple programs that distribute, say, money, exclusively, and in one payment, as in Argentina.⁴⁸ Money and an apology, as in the case of US reparations for Japanese-Americans, or money and some measure of truth-telling, as the Brazilian program ended up providing, create greater complexity. Monetary compensation, health care services, educational support, business loans, and pension reform, as in Germany and Chile, increase the complexity of the reparations efforts even more. In general, since there are certain things that money cannot buy, complexity brings with it the possibility of targeting benefits flexibly so as to tailor them to victims' needs. All other things being equal, then, this is a desirable characteristic. Of course, in most cases not all things remain equal. There are some costs to increased complexity that may make it undesirable beyond a certain threshold.

e. Integrity or coherence. Reparations programs should, ideally, display what I call integrity or coherence, which can be analyzed in two different dimensions, internal and external. *Internal* coherence refers to the relationship between the different types of benefits a reparations program distributes. Most reparations programs deliver more than one kind of benefit. These may include symbolic as well as material reparations, and each of these categories may include different measures and be distributed individually or collectively. Obviously, in order to reach the desired aims, it is important that benefits internally support one another. Thus, arguably, US reparations for Japanese-Americans, which included an apology with the reparations check, give expression to an internally more coherent plan than Brazil's which distributed money with no official acknowledgment of responsibility, and which acquired an important truth-telling function only incidentally, and not as a matter of design.

External coherence expresses the requirement that the reparations efforts be designed in such a way as to bear a close relationship with other transitional mechanisms, that is, minimally, with criminal justice, truth-telling, and institutional reform. This requirement is important for both pragmatic and conceptual reasons. It will help ensure that each of these mechanisms will be perceived as successful (despite the inevitable limitations that accompany each of them), and, more importantly, that the transitional efforts, on the whole, satisfy the expectations of citizens. But beyond this pragmatic advantage, it may be argued that the requirement flows from relations of complementarity between the different transitional justice mechanisms. It is not just that truth-telling, in the absence of reparation efforts, can be seen by victims as an empty gesture. The relation holds in the opposite direction as well, since efforts to repair in the absence of truth-telling could be seen by beneficiaries as the state's attempt to buy victims' and their families' silence or acquiescence. The same tight and bidirectional relationship may be observed between

reparations and institutional reform, since a democratic reform that is not accompanied by any attempt to dignify citizens that were victimized can hardly be understood. By the same token, reparative benefits in the absence of reforms that diminish the probability of the repetition of violence are nothing more than payments whose utility, and furthermore, legitimacy, are questionable. Finally, a bidirectional relationship also links criminal justice and reparations. In this sense, from the standpoint of victims, especially once a possible moment of satisfaction derived from the punishment of perpetrators has passed, the condemnation of a few perpetrators, without any effective effort to positively redress victims could be easily seen by victims as a form of more or less inconsequential revanchism. Reparations without any effort to achieve criminal justice may seem to them as nothing more than blood money. These complex relations obtain not only between reparations and each of the other components of transitional justice, but rather, among all of them. In other words, parallel arguments may be constructed to describe the relation between criminal justice and truth-telling, and between each of these and institutional reform.

Needless to say, both internal and external coherence are easier to achieve if reparations are designed as a *program*, and if this program is part of a transitional justice policy. But this is rarely the case, hence the reference to the cases under review as reparations ‘efforts’ rather than ‘programs’. Although the Argentinean and Chilean cases were developed in temporal proximity to other transitional mechanisms, and in the case of Chile, as part of the political platform of the *Concertación* –the alliance of parties that have governed since the end of Pinochet’s regime— none of the cases reviewed here were really designed programmatically, either in an internal sense –i.e., in a way that coordinates benefits for distinct crimes in a systematic way—let alone

in an external sense—i.e., so as to coordinate the reparations program with prosecutorial, truth-telling, and institutional reform policies.

f. Finality. By the ‘finality’ of a reparations program I refer to whether the program stipulates that receiving its benefits forecloses other avenues of civil redress. Not all reparations efforts are final in this sense. In particular, among the cases mentioned, Germany, the US, and one of Argentina’s laws are final, whereas Brazil and Chile are not. It is difficult to decide, in the abstract, whether it is desirable, in general, for reparations programs to be final. On the one hand, finality means that courts are made inaccessible to citizens. On the other, once a government has made a good faith effort to create an administrative system that facilitates access to benefits, for the reasons mentioned above, allowing beneficiaries to initiate civil litigation poses not just the danger of obtaining double benefits for the same harm, but, worse, of jeopardizing the whole reparations program. While the first problem can be easily addressed by stipulating that no one can gain benefits twice for the same violation, the second problem is not so easy to avoid for the benefits obtained through the courts typically surpass the benefits offered by a massive program. This can lead to a significant shift in expectations, and to a generalized sense of disappointment with the program’s benefits. Moreover, the shift may be motivated by cases that probably are unrepresentative of the whole universe of victims, making civil litigation prone to entrenching prevalent social biases. Wealthier, more educated, urban victims usually have a higher chance of successfully pursuing reparations litigation in civil courts than poorer, less educated, rural individuals, who may also happen to belong to less favored ethnic, racial, or religious groups.⁴⁹

g. Munificence.⁵⁰ This is the characteristic of reparations programs that relates to the magnitude of their benefits from the individual beneficiary’s perspective.⁵¹ Needless to say,

there is no absolutely reliable way to measure the absolute *worth* of the benefits, and the difficulties only increase if one aspires to do a cross-country analysis of their comparative worth. Nevertheless, abstracting from other complications, a simple comparison of the dollar value of material benefits directly distributed to victims by some recent reparations programs leads to the following *rough* ascending order of munificence: South Africa, which finally gave a once off payment of less than \$4,000 to victims, would lie on the lower side of the spectrum; the US plan for Japanese-Americans, which gave to victims a once-off \$20,000 payment would be followed by Chile, Germany, Brazil, and would end with Argentina's plan, which gave to the families of the victims of the disappeared bonds with face value of \$224,000.⁵² As this ordering makes clear, munificence, by itself, is not a criterion of success in reparations. It would be difficult to argue that the Argentinean reparations efforts, the most munificent in this list, have been significantly more successful than, say, US reparations for Japanese-Americans, which happens to be close to the bottom of the spectrum.

(A) Analytical Assessment and Evaluation: Addressing trade-offs and challenges

In this section I will concentrate on two different issues. The first one is a general overview of the trade-offs implied by some of the choices concerning the different modalities of reparations.

The second set of issues has to do with the financing of reparations efforts.

1. Dealing with the trade-offs

Although the final details of a program for a particular country will depend on heeding many contextual features, the trade-offs between different measures can be clarified in very general terms. While theorists should not be in the business of writing up blue prints of such programs—at least not in their capacity as mere theorists—there is a great deal of work that can

be done in the clarification of the advantages and disadvantages that may accompany different design choices. The following scheme illustrates the basic orientation that should guide policy-makers in the consideration of reparation measures:

a. Symbolic Measures

-Individual (personal letters of apology, copies of Truth Commission reports, proper burial for the victims, etc.)

1. Advantages:

- Constitute a way to show respect for individuals.
- Express recognition for the harm suffered.
- Low cost.

2. Disadvantages:

- May create the impression that by themselves they constitute sufficient reparations for the victims.

-Collective (public acts of atonement, commemorative days, establishment of museums, changing of street names and other public places, etc.)

1. Advantages:

- Promote the development of:
 - Collective memory;
 - Social solidarity; and
 - A critical stance toward, and oversight of, State institutions.

2. Disadvantages:

- May be socially divisive.
- In societies or social sectors with a proclivity toward feeling victimized, this feeling may be heightened.
- May create the impression that they alone constitute sufficient reparations for the victims.

b. Service Packages

Service packages may include medical, educational, and housing assistance, etc.

1. Advantages:

- Satisfy real needs.
- May have a positive effect in terms of equal treatment.
- May be cost-effective if already existing institutions are used.
- May stimulate the development of social institutions.

2. Disadvantages:

- Do not maximize personal autonomy.
- May reflect paternalistic attitudes.
- Quality of benefits will depend on the services provided by current institutions.
- 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.

c. *Individual Grants*

1. Advantages:
 - Respect personal autonomy.
 - Satisfy perceived needs and preferences.
 - Promote the recognition of individuals.
 - May improve the quality of life for the beneficiaries.
 - May be easier to administer than alternative distribution methods.
2. Disadvantages:
 - If they are perceived solely as a way of quantifying the harm, they will always be viewed as unsatisfactory and inadequate.
 - If the payments fall under a certain level, they will not significantly affect the quality of life of the victims.
 - This method of distributing benefits presupposes a certain institutional structure. (The payments can satisfy needs only if institutions exist that “sell” the services that citizens wish to purchase.)
 - If they are not made within a comprehensive framework of reparations, these measures may be viewed as a way to “buy” the silence and acquiescence of the victims.
 - Politically difficult to bring about, as the payments would compete with other urgently needed programs, may be costly, and may be controversial as they would probably include ex-combatants from both sides as beneficiaries.

There are those who think that reparations can also take the shape of development programs. I do not subscribe to that approach but for the present analysis’ sake, the following may be said.

d. *Development and Social Investment*

1. Apparent Advantages:
 - Gives the appearance of being directed toward the underlying causes of the violence.
 - Would appear to allow due recognition to be given to entire communities.
 - Gives the impression of making it possible to reach goals of justice as well as development.
 - Politically attractive.
2. Disadvantages:
 - Has very low reparative capacity, for:
 - development measures are too inclusive (are not directed specifically toward the victims), and
 - they are normally focused on basic and urgent needs, which make the beneficiaries perceive them as a matter of right and not as a response to their situation as a victim.

- In places characterized by a fragmented citizenry, these measures do nothing to promote respect for individuals rather than as members of marginal groups.
- Uncertain success: development programs are complex and long-term programs. This threatens the success of the institutions responsible for making recommendations regarding reparations, which may lead to questions regarding the seriousness of the transitional measures in general.
- Development plans easily become the victims of partisan politics.

In principle, there is no conflict at all between the distribution of symbolic and material reparations. In fact, ideally, these benefits can lend mutual support to each other, something that will be especially important in contexts characterized by scarce resources, where symbolic reparations will surely play a particularly visible role. Nor is there any conflict at all, in principle, between individual and collective measures. As long as there is a substantial individual component, the exact balance between the two kinds of measures should be established taking into consideration, among other factors, of the kind of violence sought to be redressed. In those places where the violence was predominantly collective, it makes sense to design a program that also places special emphasis on these kinds of methods.

Having said this, it should be obvious from considerations under point d, above, that I am skeptical of the effort to turn a program of reparations into the means of solving structural problems of poverty and inequality; strictly speaking, a development program is not a program of reparations. In fact, development programs have a very low reparative capacity, for, to reiterate the fundamental points, they do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims.

Here it is worth returning to the distinction between reparations in their strict sense, and the reparative effects of other programs. Development, just as criminal justice, for example, may have reparative effects. Nevertheless, this does not make either of them part of the domain of responsibility of those who design programs of reparation. Naturally, we may insist here that the latter must cohere with other aspects of transitional policies. That is to say, the program must be internally and externally coherent, and it must avoid reproducing and perpetuating unjust social structures. In the last analysis, a transitional government in a poor country will most likely propose a development plan, and ideally, the program of reparations must also cohere with that plan. But the point I have emphasized is that it is important to set boundaries of responsibilities between different policies, for strictly speaking, the aims of a program of reparation are not the same as that of a development or social investment plan.

In contexts of deep poverty (accompanied, as it usually happens, by weak state institutions) it is likely that transitional governments will be particularly tempted to forego reparations in favor of development programs. The case is often made that when a society is missing even the most basic elements of a productive infrastructure or of the rule of law –not to speak of a welfare state—there is no point in trying to give reparations to victims. This position merits two responses, one from a normative, and the other from a pragmatic perspective. Both of them start by acknowledging that of course, context matters. The normative response, however, insists that if it is true that reparations to victims are a matter of obligation, contextual factors matter not in the sense that they can dissolve the obligation, but merely ‘modulate’ the way it is met. Here the most important variables are munificence, the magnitude of awards given, and the timing of the program vis-à-vis other elements of the transition.⁵³ The pragmatic response consists of a reminder not just of the potential advantages to be had if the reparations program

indeed contributes to the fostering of trust in the institutions of the state, but also, of the fact that historically, claims to justice, including reparations, have not faded away, and sometimes, have (re)-emerged in socially divisive ways. Thus, all things considered, it may be that reparations, even under conditions of scarcity, are one of those issues with respect to which morality and prudence converge.

2. Financing Reparations

This discussion leads to the final point of this section, the financing of reparations programs. Here I can only highlight some important points, based on a careful analysis of various experiences in different parts of the world:⁵⁴

1. Despite the expectations of many post-conflict or transitional societies, the international community rarely provides significant resources to finance reparations initiatives. The reason for this reluctance is two-fold: first, and not unreasonably, given that reparations benefits are not simply the equivalent of a crime insurance scheme, but rather, should always involve a dimension of acknowledged responsibility, the international community has often argued that reparations should be primarily a local initiative.⁵⁵ Second, given that implementing reparations plans always involves sensitive political decisions, the international community has little incentive to get involved in a potentially divisive arena.

It goes without saying that low socio-economic development, and a large universe of potential beneficiaries, place great constraints on the ability of a local government to implement a reparations plan. To illustrate the point with examples from the Americas, Guatemala, El Salvador, and Haiti, for instance, have not implemented reparations plans, whereas Chile, Argentina, and Brazil have. This correlation between socio-economic

development and reparations is more complex than it seems, however. In the first place, while it appears that some minimum degree of economic development is a sort of threshold for implementing reparations, once that threshold is reached, countries in similar economic situations often take quite different paths on the issue, as shown most clearly in the cases of Chile and Argentina. In the second place, and perhaps more importantly, the examples given above of countries where reparations plans have not been implemented are cases in which the political constraints to implementing reparations plans were perhaps as significant as the economic constraints. What emerges clearly from an analysis of failed efforts at implementing reparations is that in the absence of strong and broad coalitions in favor of reparations, no plans, or at best very modest plans are implemented, even if the country could have afforded to do better, South Africa being a good example.

2. There are two main models for the financing of reparations: creating special trust funds, or, introducing a dedicated line in the yearly national budget for reparations. Countries that have experimented with the first model have fared significantly worse than countries that have used the second. Part of the reason may have to do with a question of political commitment. Nothing illustrates commitment more clearly than the willingness to create a budget line. The expectation that it will be possible to find alternative sources of funding (recovery of illegal wealth, donations, special taxes, debt swaps, etc.) for purposes of reparations underlying the creation of trust funds may either demonstrate, or actually give rise to, weak political commitments—emphasizing yet again that although socio-economic development is important, it should not cloud the crucial significance of political factors.

(B) Conclusions and Policy Recommendations

In conclusion, and based on extensive research on massive reparations efforts, it is possible to make the claim that in crafting a reparations program it is important to be mindful of the following considerations:

- Ideally, the class of beneficiaries of the program should be ‘complete,’ coinciding with the class of victims of abuse or conflict. Special care should be taken in implementing effective outreach measures to publicize the existence of the programs. More importantly, great attention should be paid to the way in which the categories of crimes that give rise to benefits through the program are selected. Frequently, such categories have been selected in a way that excludes from benefits those who have been traditionally marginalized, including women and some minority groups. To compensate all victims, of course, does not mean that all of them have to be compensated equally, that they must receive the same benefits.
- The possibility of achieving completeness, of providing benefits to all the victims of abuse or conflict, is related to the program’s ‘comprehensiveness.’ Focusing on a very narrow set of categories of crimes means that the program will exclude large numbers of victims, which is not only unfair, but also increases the likelihood that those victims’ claims will remain on the political agenda for a long time to come.
- In order to make it feasible to provide benefits to all victims of all relevant categories of crime, it is important to design a program that distributes a variety of material and symbolic benefits, and does so in a ‘coherent’ way.
- In addition to coordinating the benefits it distributes, a reparations program should itself operate in coordination with other justice measures, for otherwise, the program may easily

become the target of justified criticism. Reparations programs that function in the absence of other justice measures invite the interpretation that the benefits they distribute constitute the currency with which the state tries to buy the silence or acquiescence of victims and their families, turning the benefits into “blood money.” Hence, it is important to make sure that reparations efforts cohere with other justice initiatives including criminal prosecutions, truth-telling, and institutional reform

- If two of the critical aims of a reparations program are to provide recognition to victims, not just in their status of victims but also of citizens, of bearers of equal human rights, and to promote their trust in the institutions of the state, it is important to get victims involved in the process of designing and implementing the reparations program. Open, deliberative, and participatory processes must be designed.
- States should not expect to receive substantial financial assistance from the international community for purposes of repairing victims. This means that those agents that favor reparations should prepare themselves for protracted political struggles of the sort that are always necessary to mobilize large amounts of resources.
- The previous recommendation, given for the sake of realism, however, should not be taken by the international community as an excuse for inaction in this field. In my view, the international community could (a) rethink, at least in some cases, particularly in those cases in which international actors have played an important role in a conflict, its reluctance to provide material support to reparations efforts; (b) provide technical assistance in the design and implementation of reparations programs; (c) pressure multilateral institutions to foster conditions under which post-conflict economies can afford to pay due attention to the victims of conflict (comparable to the attention that ex-

combatants often receive *with international assistance*); (d) pressure local governments to establish meaningful reparations for victims.

¹ For an account of these two cases see Lawrence Weschler, *A Miracle, A Universe. Settling Accounts with Torturers*. (New York: Pantheon Books, 1990). See also Alexandra Barahona de Brito, *Human Rights and Democratization in Latin America Uruguay and Chile* (Oxford: Oxford University Press, 1997).

² See e.g., Paula Speck “The Trial of the Argentine Junta: Responsibilities and Realities,” *University of Miami Inter-American Law Review* vol. 18, (1987) pp. 491-534. Alejandro Garro and Henry Dahl, “Legal Accountability for Human Rights in Argentina: One Step Forward and Two Steps Backward,” *Human Rights Journal* vol. 8 (1987) pp. 283-344. Carlos S. Nino “The Duty to Punish Abuses of Human Rights Put Into Context: The Case of Argentina” *Yale Law Journal* vol. 100 (1991) pp. 2619-2640.

³ Cf. Aryeh Neier “Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda,” in *Human Rights in Political Transitions: Gettysburg to Bosnia*, Carla Hesse and Robert Post, eds., (London: Zone Books, 1999).

⁴ These three commissions were established in contexts in which predictably, criminal prosecutions were not going to make great strides. However, it is a mistake to think that they constituted the beginning of an explicit trade off between truth and justice; none of them offered amnesty in exchange for truth. The first commission to do this was the South African Truth and Reconciliation Commission. Even here it is not entirely fair to say that the South African model assumed the truth v. justice dilemma wholesale. The decision to grant an amnesty to a particular perpetrator was made by a different committee than that which took the testimony, and the amnesty could be denied if the testimony was incomplete, inaccurate, or if it related to incidents that bore either no relationship to a political cause or no proportionality to the causes sought. Indeed, of the 7,116 amnesty petitions received by the TRC only 1,167 were granted. Those denied amnesty are liable to prosecutions. However, up to date (May 2005) the prosecutorial efforts have been very slow and not particularly successful. See Martin Coetzee, “An Overview of the TRC Amnesty Process,” in *The Provocations of Amnesty: Memory, Justice and Impunity*, Charles Villavicencio and Erik Doxtader, eds., (Trenton, NJ: Africa World Press, 2003), p. 193.

⁵ John Torpey argues persuasively that the recent emphasis on reparations has also been aided by the ‘death of politics;’ in an age in which claims to distributive justice have lost virtually all their political track, some claims

to redistribution are made in the vocabulary of reparations for victims. See his insightful “‘Making Whole What Has Been Smashed’: Reflections on reparations,” *Journal of Modern History* 73, 1 (2001): 333-58.

⁶ As I argue below, the complexity and integrity of reparations measures are crucially important factors

⁷ Reparations benefits are most often the result of relatively isolated initiatives that come about incrementally, rather than from a deliberately designed plan.

⁸ Cf. Aristotle, *Nicomachean Ethics* Book V, chs 2-4.

⁹ Book XVII, Ch. X.

¹⁰ The fact that the recipient state (Israel) came into existence only *after the conflict*, makes the case novel even from the perspective of inter-state reparations.

¹¹ See Ariel Colonomos and Andrea Armstrong, “German Reparations To The Jews After World War Two: A Turning Point In The History Of Reparations” in *The Handbook*.

¹² For a fuller treatment of the issues discussed in this section, see my “Justice and Reparations,” in *The Handbook*, and “Reparations Efforts in International Perspective.”

¹³ In the Chorzow Factory case, the Permanent Court of International Justice (PCIJ) declared that “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” Chorzow Factory (Jurisdiction), 1927 PCIJ, ser. A, No. 9, at 21 (July 26). For a fuller treatment of the international law treatment of remedies, see Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999), and her “The United Nations Draft Principles On Reparations For Human Rights Violations: Context And Contents,” in *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, M. Bossuyt, P. Lemmens, K. de Feyter and S. Parmentier, eds. (Brussels: Intersentia, forthcoming).

¹⁴ Universal Declaration of Human Rights, UN Doc. A/RES/217A (III) of 10 December 1948.

¹⁵ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S 123 entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

¹⁶ International Covenant on Civil and Political Rights, UN Doc. A/RES/2200A (XXI) of 16 December 1966.

¹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46 of 10 December 1984.

¹⁸ The European Convention on Human Rights, Council of Europe, Rome 4 November 1950.

¹⁹ A good illustration of this point comes from South Africa, whose government, at the same time as it was refusing to implement the recommendations on reparations made by the TRC, arguing that to do so would be too expensive, was buying two submarines for its navy. See, Brandon Hamber and K. Rasmussen. “Financing a Reparations Scheme for Victims of Political Violence,” in *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa*, Brandon Hamber and Thloki Mofokeng, eds. (Johannesburg: Centre for the Study of Violence and Reconciliation, 2000), 52-59. The Peruvian government seems to be following the same lead. More than a year after its own TRC made comprehensive recommendations on reparations, which so far remain largely unheeded, the government is considering an expansion of its navy.

²⁰ *Justice and Reparations*, a forthcoming book by the author, spells out the reasons why the procedure that would have to be implemented in order to satisfy the criterion of full restitution may end up underserving the notion of justice that is called for in the latter type of situation. The problem has to do with the fact that in the effort to repair *each individual* in proportion to the harm s/he has suffered, the procedure ends up “disaggregating” both the victims and the reparations efforts. In the process, a dangerous inegalitarian message might be sent, namely, that the violation of the rights of the affluent is a more serious offense than the violation of the rights of the less well-off. See also the paper I coauthored with Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints,” in *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, M. Bossuyt, P. Lemmens, K. de Feyter and S. Parmentier, eds.

²¹ See, for example, Theo van Boven, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.” UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. UN document E/CN.4.Sub.2/1993/8. On April 13, 2005, the UN’s Human Rights Committee finally adopted the principles, without changing these categories substantially. See E/CN.4/2005/L.48.

²² See the very detailed case studies of 12 countries in *The Handbook*, and my “Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice.”

²³ The numbers of beneficiaries, of course, need not correspond to the number of victims of human rights abuses in any given case.

²⁴ See Ignacio Cano and Patricia Ferreira, “The Reparations Program in Brazil,” in *The Handbook*.

²⁵ This figure includes only the beneficiaries of the pension program started in 1991 by the Corporación Nacional de Reparación y Reconciliación, and represents the program's highest number, at its inception, since some of the benefits terminated when children of the victims turned 25 or finished university education. By the end of 2001 the number of beneficiaries had declined to 3,210. The 6,000 figure therefore, does not include the many thousands of beneficiaries of the health program, or of pensions for the politically dismissed, etc. Nor does it include the tens of thousands of persons that will become the beneficiaries of the effort suggested by the recent Commission on Illegal Detention and Torture. See Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile," in *The Handbook*.

²⁶ This figure includes 7,800 beneficiaries under law 24.043 (illegal detention, death, and grave injury), and 5,655 under law 24.411 (disappearance and death). It is therefore an upper limit, for law 24.043 gave benefits for cases other than loss of life. See María José Guembe, "The Argentinean Experience with Economic Reparations for Serious Human Rights Violations," in *The Handbook*.

²⁷ See, Eric Yamamoto and Liann Ebesugawa, "Report on Redress: The Japanese American Internment," in *The Handbook*.

²⁸ As was reported above, the German individual compensation efforts have benefited more than 2 million persons. But this figure includes recipients of the different benefits. Germany has spent \$3.5 billion as of December 2001 on loss of life compensation. But I have no precise figures on the number of beneficiaries. See Ariel Colonomos and Andrea Armstrong, "German Reparations to the Jews After World War Two: A Turning Point In The History Of Reparations" in *The Handbook*.

²⁹ Argentina provided reparations for 'grave injuries' caused during illegal detention, starting with Decree 70/90 (1990) and continuing with Law 24.043 (1991). Perhaps the most expedient, but not the most accurate, way of dealing with the problem of evidence is that adopted by the Chilean Commission on Torture and Illegal Detention, which, after investigating the *modus operandi* of certain detention centers, asserted that it could safely be assumed that anyone detained in those centers was, indeed, tortured. See, *Reporte de la Comisión Nacional Sobre Prisión Política y Tortura* (Santiago: 2004).

³⁰ Article 1, Law 9,140/95. See Cano and Ferreira, "The Reparations Program in Brazil," in *The Handbook*.

³¹ See Yamamoto and Ebesugawa, "Report on Redress: The Japanese American Internment," in *The Handbook*.

³² This lack of differentiation contrasts with the very precise definition of the crimes the victims suffered in the *Hori* class action suit, filed in 1983, which charged the government with 21 separate legal injuries, and demanded the payment of \$10,000 to each victim for each of these violations. The suit was dismissed on statute of limitations grounds, but nevertheless served to galvanize the movement in favor of reparations for Japanese-Americans. See Yamamoto in *The Handbook*.

³³ This included 2,260 Latin Americans of Japanese ancestry whom the US helped to kidnap and placed in the internment camps for possible hostage exchanges with Japan. A class action suit, settled in June 1998, *Mochizuki et al. v. United States*, led to an official apology by the US government and redress payments of \$5,000 to each eligible Japanese Latin American. Some victims continued the legal struggle to gain the same benefits offered to US citizens or permanent residents by the 1988 Civil Liberties Act, namely, \$20,000.

³⁴ This problem was addressed by a 1992 amendment to the 1988 Act.

³⁵ See Lira, "The Reparations Policy for Human Rights Violations in Chile," in *The Handbook*.

³⁶ Law 19.123 of 8 February 1992.

³⁷ Law Num. 18.994, (1990) Law Num. 19.074 (1991), Law Num. 19.128 (1992).

³⁸ Law Num. 19.234 (1993), Law Num.19.582 (1998).

³⁹ The government of President Frei used Law Num 18.056 (1981), authorizing grace pensions to deal with this particular set of beneficiaries.

⁴⁰ *Promotion of National Unity*, sec. 1(1)(xix)(a), 1(1)(ix).

⁴¹ See, e.g., Mahmood Mamdani, "Reconciliation Without Justice," *Southern African Review of Books* Nov/Dec: 3-5 (1996).

⁴² I am grateful to Paul van Zyl for conversation about these issues.

⁴³ See Guembe, "The Argentinean Experience with Economic Reparations for Serious Human Rights Violations," in *The Handbook*.

⁴⁴ Law 23.466 (1986), Law 24.411 (1994).

⁴⁵ Decree 70 (1991), Law24.043 (1991).

⁴⁶ Law 25.914 of August 30, 2004.

⁴⁷ See John Authers, "Making Good Again: Compensation for Nazi Concentration Camp Inmates," in *The Handbook*.

⁴⁸ This, of course, simplifies reality. It abstracts from the complexities introduced by the fact that the payments were made in bonds, and from other features of the general context like the vagaries of the prosecutorial efforts, the significant amount of information about the past that became available through “truth trials” and other means, and from institutional reforms that were taking place in Argentina as the reparations laws were being enacted and implemented. See, again, the paper by M.J. Guembe in *The Handbook*.

⁴⁹ For a contrasting perspective on this issue, see Jaime Malamud Goti and Lucas Grossman, “Reparations and Civil Litigation,” in *The Handbook*. Regardless of one’s position on the merits of finality, it is important to acknowledge the very significant catalytic role played by litigation in different instances. In the Latin American context, cases before the Inter American Human Rights Commission and Court have prodded different governments to establish massive reparations programs.

⁵⁰ I have chosen this old-fashioned term because I do not want to talk about the ‘generosity’ of reparations programs. I see reparations as a matter of right, not generosity. Nevertheless, it is clear that even if one considers this an issue of right, there is a large range of options concerning what it takes to satisfy that right.

⁵¹ The caveat is important, for in the aggregate, if the number of victims is significant, programs may end up distributing large amounts of money—each victim, of course, receiving a small amount. US reparations for Japanese-Americans is a case in point.

⁵² I emphasize the roughness of the ordering. Part of it is due to the fact that some of the programs gave benefits in a lump sum (US, Brazil, Argentina), and two of them in the form of pensions (Chile and Germany), and establishing the total value of a pension is always a difficult exercise.

⁵³ Thus, one of the great advantages of conceptualizing reparations in terms of recognition and civic trust, is that it clearly accommodates contextual factors more easily than a less flexible criterion such as *restitutio in integrum*.

⁵⁴ See Alexander Segovia’s original contribution to this area, “Financing Programs of Reparation: Reflections from International Experience,” in *The Handbook*.

⁵⁵ This, of course, would count in favor of international support for reparations in those (various) cases in which parts of the international community have contributed to fueling internal conflicts! (More on this below).