
INTRODUCTION

REPAIRING THE PAST: COMPENSATION FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS

P A B L O D E G R E I F F

This book is intended to provide a broad range of essential information about past experiences with massive reparations programs as well as normative guidance for future practice. That a project such as this one is still necessary is surprising, as a good number of the countries that have emerged from conflict or that have undergone transitions to democracy have at least 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, and more than a few of the countries in transition have actually implemented such programs.¹ A great deal of attention has been paid to what postconflict or transitional countries have attempted to do by way of prosecuting human rights violators, but much less attention has been paid to these countries' efforts by way of reparations for the victims. Clearly, both kinds of efforts, the prosecutorial and the reparative, can be considered elements of justice, but the latter has not received sufficient systematic attention.

It is worth emphasizing that from the standpoint of the victims, reparations programs may occupy a special place in a transition out of conflict or towards democracy. For some victims reparations are the most tangible manifestation of the efforts of the state to remedy the harms they have suffered. Criminal justice—even if it were completely successful both in terms of the number of perpetrators accused (far from being the case in any transition) and in terms of results (which are always affected by the availability of evidence, and by the persistent weaknesses of judicial systems, among other factors)—is, in the end, a struggle *against perpetrators* rather than an effort *on behalf of victims*. Something similar can be said with respect to other transitional justice measures; from truth telling victims will obtain significant benefits that may include a sense of closure derived from knowing the fate of loved ones, and a sense of satisfaction from the official acknowledgment of that fate. But, in the absence of other positive and tangible manifestations truth, by itself, can easily be considered as an empty gesture, as cheap and inconsequential talk. Finally, institutional reform will always be a long-term project that affects the lives of the victims indirectly. Hence, it makes sense to think that at least in terms of potential direct impact on victims, reparations do occupy a special place among transitional measures.

Having said this, the project does not seek to provide an overview of the panoply of initiatives that can be taken in a postconflict or transitional context to improve the lot of victims, and not because these initiatives are either unimportant or not called for by notions of fair governance, sustainable development, moral decency, or even justice itself (understanding the term broadly). In a sense, the project has a much narrower purpose in mind, namely to examine questions around the design and implementation of massive reparations programs, programs that seek to compensate in some way a large universe of victims of human rights violations. Indeed, as the title of this introduction suggests,² the project focuses in particular on measures of material compensation. While the research has helped to underscore the importance of designing programs that are ‘complex’ in the sense that they distribute a variety of benefits (material and ‘symbolic’) and ‘coherent’ in the sense that they establish close relations not just between the various benefits that they distribute, but importantly, between the reparations benefits and other transitional initiatives such as prosecutions or truth telling, the main focus of investigation is the material compensation distributed by large-scale, and mostly administrative, programs.³

When this project started it was not easy to access even basic information about the sort of program that various transitional or postconflict countries have set in place in order to give some measure of redress to a large universe of victims. There was no systematic work available on the criteria of justice that can be applied to the resolution of large numbers of reparations claims, or on the many questions that frequently arise in the design and implementation of large-scale reparations

programs. This project seeks to address this dearth of information and reflection. It is the result of three years of work on the part of an interdisciplinary and international group comprising twenty-seven authors from fourteen different countries.

I

Part I of this book contains a series of highly detailed case studies meant to illustrate international experience with reparations programs and to provide both the empirical grounding and the basis of inquiry for the thematic chapters in Part II. These case studies are both broad in their scope and deep in their scrutiny. They include the history of the discussions leading up to the institutionalization of the reparations initiatives as well as the ‘nuts and bolts’ of the different programs: their budgets, eligibility criteria, staffing requirements, administrative structure, economic impact, sources of funding, and so on. Whenever possible, the studies were carried out in a way that reflects multiple perspectives, including those of victims, beneficiaries, government officials, participants, and other civil society actors interviewed by the authors. The cases themselves were selected so as to ensure diversity along a variety of axes, including geographical location, the degree of socioeconomic development of the host country or institution, the number of beneficiaries, the complexity and the magnitude of the benefits distributed, and the type of conflict to which the programs responded.

It goes without saying that in a limited sense, there is no such thing as a perfect sample. The set of case studies included here reflects the criteria just mentioned, but also contingent although unavoidable factors such as the availability of resources (material, human, and informational, to name just a few). However, there is nothing arbitrary about the final selection. The reasons for including each case were always various, but they include the following:

- Argentina: This is the earliest reparations program of any in a South American transition. It is also extraordinarily ‘munificent’ in the sense that its individual awards were very large. It also had interesting features both in terms of delivery (a one-off ‘payment’) and of financing (government bonds).
- Chile: Despite the geographical proximity, the cultural continuities, the similarities of the predecessor regimes in each country, and the fact that the discussions about reparations in neighboring Argentina could have created path dependence

in Chile, reparations in the latter took a very different form; emphasis was placed from the beginning on providing a wider variety of benefits, and the compensation awards were distributed in the form of a monthly and not particularly large pension.

- Brazil: This was an effort with a very small number of beneficiaries and one that at least in terms of design was disconnected from other transitional justice measures. Although the program was designed as a mere mechanism of distribution, over time it acquired an important truth-telling function. The case therefore raises interesting questions about the relationship between reparations and other justice measures.
- El Salvador and Haiti: Despite the many differences between the two countries, it turns out that some of the reasons why neither ever implemented a reparations program are similar. They have to do with the absence of broad political coalitions in favor of reparations, a factor that is important in its own right, but that acquires especial salience in discussions about the financial challenges that reparations programs always face.
- South Africa: In the field of transitional justice South Africa occupies an important place. Regarding reparations, specifically, in addition to the ambitious program proposed by the Truth and Reconciliation Commission, which in itself makes the case worth studying, the impact that the government's failure to implement these recommendations had on people's perceptions of the work of the commission overall, gives some evidence of the significance of reparations in a transitional process.
- Malawi: This case is interesting both because it comes from a context of severe scarcity and because of the use of an arbitration tribunal that attempted to individualize harms.
- USA: Japanese American Internment: Notwithstanding the fact that it is a reparations case in an affluent country (and that the overall cost was relatively high), the program actually provided to individual beneficiaries what in the US context are not tremendously munificent benefits. Nevertheless, despite inevitable shortcomings, this program is generally considered successful. Part of the explanation may have to do, precisely, with the way in which it established links between material compensation and other measures such as official apologies and education initiatives.
- USA: September 11 Victims' Fund: Although this is not a typical reparations program, the fundamental reason to include a chapter on this case in this book is that it affords the possibility of examining the limitations of procedures that individualize benefits, even in a context in which the availability of resources is guaranteed. Thus, even if the criterion of *restitutio in integrum* can be satisfied, the case suggests that an individualizing procedure generates significant challenges. This is an important cautionary lesson.

- United Nations Compensation Commission (UNCC): This is a case that was designed and operated by the UN, the ‘keeper’ of the principles of reparations, and that neutralized to a large extent the problem of funding (by relying on the proceeds of Iraqi oil, specifically earmarked for this purpose by the UN). However, it is interesting to consider whether, and regarding which types of claim, the principles were respected by the program. Additionally, the case is important because the UNCC designed and implemented the most sophisticated assessment and mass claims processing system ever devised.
- Germany: Holocaust Reparations: Despite the fact that this case is the historical referent for most reparations programs, it is surprisingly difficult to come by a synthetic presentation of how it actually operated. In addition to offering a detailed overview of this effort, this case study provides an illustration of a truly gargantuan program not just in terms of beneficiaries but also in respect to their geographical dispersion.
- Germany: Forced and Slave Labor Reparations: Despite the nature of the earlier German reparations programs, this case illustrates the difficulties that arise from an insufficiently ‘complete’ program. Whole categories of victims excluded from the previous program continued the struggle for reparations. The case also provides an illustration of an innovative approach to the problems that are generated when a precise number of beneficiaries that have to be redressed is unavailable, a problem frequently encountered in postconflict situations.

Finally, it is worth pointing out that these case studies include papers on cases that have not been addressed systematically yet outside this project, such as those on Brazil, Malawi, the September 11 Fund, and the unimplemented reparations proposals in El Salvador and Haiti. Even in those cases with respect to which information, albeit from disparate sources, is available, the project includes papers that provide a comprehensive, yet thorough, account of reparations programs (e.g. German Holocaust reparations and the UNCC). The papers present genuinely novel information about some programs, including the paper on Chile, which provides a much more accurate impression of the scale and diversity of that country’s reparations efforts than anything available thus far, or the paper on Argentina, which offers one of the few serious attempts to quantify the magnitude of the costs of its different reparations programs.

Rather than summarizing the results of the empirical research, and thus offering help that readers are unlikely to need, I will concentrate on the more useful attempt to provide a taxonomy of reparations efforts, one that in its basic categories presents some of the main challenges faced whenever reparations programs have been undertaken.⁴

Scope

Reparations efforts can have greater or lesser scope according to the total number of beneficiaries they cover.⁵ Understood in this manner, there is no inherent merit in a program having greater scope. The fact that one program makes reparation to 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'.

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, and not only because of 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 selection of the rights whose violation leads to reparations benefits, but this 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, this will of course exclude many people who otherwise deserve to get benefits; the second has to do with structural issues such as the outreach efforts undertaken to publicize the existence of the program, and the hurdles associated with accessing it, including narrow application deadlines, closed lists, requirements to file applications personally, and others. It goes without saying that completeness is a desirable characteristic in a reparations program, and that the mere fact that a program is created will not guarantee it. Rather, serious efforts are called for, particularly considering that a history of both marginalization and abuse might lead large numbers of potential beneficiaries, including entire groups, not to apply to the program at all. The South African reparations effort, despite the outreach initiatives carried out by the Truth and Reconciliation Commission, has become subject to criticism for, among other things, having left many potential beneficiaries out of the commission's closed list.

Comprehensiveness

A not unrelated category is the effort's comprehensiveness, which refers to the distinct types of crimes or harms it tries to redress. Whatever consensus there is in international law about reparations, it is only just emerging, and the boundaries of

this obligation remain porous. For instance, there seems to be emerging consensus 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 territorial displacement. The situation is still more complicated in practice as, just to mention an example, ‘really existing’ reparations programs notoriously underrepresent the international law consensus on the obligation to make 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 (acknowledgedly, not a simple matter to resolve). 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.⁶

In general, and perhaps not surprisingly, most reparations efforts have concentrated on a fairly limited (and traditional) catalog 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 diminishes the reparations program’s comprehensiveness, and as a consequence, its completeness.

All existing reparations programs can be faulted for being insufficiently comprehensive. At the most general level, it can be argued that frequently decisions concerning the catalog of rights whose violation triggers reparations benefits have been made in a way that excludes from the programs those who have been traditionally marginalized, including women and some minority groups. It is not difficult to find the more concrete and specific exclusions for which each reparations program can be arguably faulted. These exclusions have usually fueled continued efforts for increasing each of the programs’ comprehensiveness, and in some cases, the struggles have succeeded. Take, for instance, the case of Argentina.⁷ There is no such thing as a reparations program in any strict sense of the word ‘program’ in Argentina. Instead, there are several initiatives, each stemming from a separate piece of legislation and covering a distinct set of victims. The main laws cover the following sets of crimes: disappearance⁸ and arbitrary detention and grave injuries and death while in detention.⁹ While these laws covered most of the victims of the worst forms of abuse perpetrated under the Juntas, they excluded some important categories of victims: 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 who remained in military areas. Perhaps the most notorious exclusion was that of 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). A recent law redresses these exclusions.¹⁰

The case of South Africa is particularly challenging in this respect.¹¹ As is well known, the South African Truth and Reconciliation Commission (TRC) made far-reaching recommendations for the reparation of the victims of apartheid. A 'victim', according to the Act which led to the establishment of the TRC 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]'.¹² 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 were left out of consideration.¹³ 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, in a sense, 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 TRC about whether to make reparations on behalf of 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 been.¹⁴

In some countries the dynamics tending towards greater comprehensiveness have not borne fruit yet, but it is likely that over time they will. For instance, Brazil's reparations effort was intended to provide reparations only to the victims of disappearance and death for 'non-natural causes in police or similar premises'¹⁵ (notwithstanding how extensively this last criterion was understood by the commission in charge of the program). It therefore left out important categories of victims including the illegally detained, the tortured, and the exiled. However, there continues to be political activism in favor of expanding the reparations program. The last chapter of this story is still to be told.

The pattern of progressively larger comprehensiveness is illustrated by programs in a variety of settings. In Chile, as elsewhere, a good part of the initial 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.¹⁶ Other measures intended to benefit additional groups of victims—such as exiles, political prisoners, people who had been dismissed from their jobs for political reasons, and others—were taken over the years. For decades, however, the most significant omission in Chile’s reparations efforts was the exclusion of victims of the most prevalent forms of violations during the regime, i.e. 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.

The same pattern can be observed in German reparations, notwithstanding a very long delay. Despite the enormity of the reparations afforded by subsequent German laws¹⁷ these programs, until quite recently, excluded 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) and the Roma, among others.¹⁸ These exclusions led to the reopening of the reparations issue in Germany starting in the late 1980s and running through the mid-1990s, to the conclusion of the now famous slave and forced labor reparations negotiated, at least in part, to avoid litigation against German companies in the USA. This new program not only recognized forced and slave labor but was also open to some of those who had been excluded by the Final Law’s residency requirements.¹⁹

All things considered, comprehensiveness is a desirable characteristic. It is better, both morally and practically, to repair as many categories of crime as feasible. From the standpoint of political morality, the advantages should be obvious; greater comprehensiveness is an expression of what elsewhere I called ‘the dynamics of inclusion and ownership behind law making’. Modern societies are no longer content with living under laws stemming from ‘our god’, or ‘our sovereign’; we expect to live under *our* laws. We now recognize a rule as a law not merely because of its capacity to guide our behavior but primarily because of its authority to do so, where this authority is intimately linked to the rule’s legitimacy, something it gains precisely in virtue of the fact that we can consider it to be *our* rule, one that we give to ourselves (ownership), where the ‘ourselves’ keeps growing (inclusion).²⁰ This dynamic, which applies across all sorts of issues regulated by law, including reparations, explains the familiar pattern whereby over time reparations efforts become increasingly comprehensive.

The pragmatic advantages of such increasing inclusiveness are not unrelated to this account. Leaving important categories of victims unaddressed not only deprives a transitional administration of the gains in legitimacy that it might accrue by establishing a comprehensive reparations program but it also virtually guarantees that the issue of reparations will continue to be on the political agenda, which means it will remain available as the target of legislative or bureaucratic give and take. This may undermine the stability and reliability of reparations agreements, as the Chilean case exemplifies.

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.²¹ Money and an apology (US reparations for Japanese Americans), or money and some measure of truth telling (as the Brazilian program ended up providing), constitute an increase in 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 still 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 respond to victims' needs more closely. 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.

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 that 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, i.e. minimally, with criminal justice, truth telling, and institutional reform. This requirement is both pragmatic and conceptual. The relationship increases the likelihood that each of these mechanisms 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 the relations of complementarity between the different transitional justice mechanisms. Here I can only sketch the basic argument. For example, it is not just that truth telling, in the absence of reparations 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 who 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, the same bidirectional relationship 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 appear 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. That is, 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. Since this is rarely the case, I have for the most part referred to the cases under review here not as reparations 'programs', but 'efforts'.²² 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 has 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, or in an external sense, i.e. so as to coordinate the reparations program with prosecutorial, truth-telling, and institutional reform policies.

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 or not. Not all reparations efforts are final in this sense. In particular, among the cases mentioned, Germany, the USA (the programs to repair both Japanese American internees and the victims of the September 11 attacks), 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 have been 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 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 destabilizing the whole reparations program also. 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, as 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.²³

Munificence²⁴

This is the characteristic of reparations programs that relates to the magnitude of their benefits (from the individual beneficiary’s perspective).²⁵ 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* ascend-

ing order of munificence: South Africa, which finally gave a one-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 one-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 \$224,000.²⁶ As this ordering makes clear, it is obvious that 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 happen to be close to the bottom of the spectrum.

II

Part II of this book examines in detail some of the various challenges that frequently come about in the design and implementation of reparations programs. One of the main goals of this set of chapters is to contribute to the articulation of a conception of justice that can be applied to the massive cases. This involves, to begin with, some normative and conceptual analysis focusing on the boundaries of the concept of reparations—a term whose meaning is not settled either in theory or in practice—examining the relationship between reparations and other transitional justice measures, and attempting to articulate the goals of legitimate reparations programs. Such analysis is particularly important, for while there is solid consensus about the criterion of reparatory justice for the relatively isolated case, namely *restitutio in integrum*—the effort to reestablish the situation prior to the wrongful act (or omission), or to compensate the victim in proportion to the harm suffered—there is no consensus yet around a criterion of justice for the massive cases. That there is a need to work out a conception of justice for these cases is itself a challenging proposition at least in part because it puts to the test our preference for an ordinary conception of compensatory justice ('compensate in proportion to the harm') and for familiar legal procedures (that individualize responsibility, calculations of harm, etc.) Evidence suggests that the criterion of full restitution is rarely, if ever, satisfied by the massive programs.²⁷ It would be too facile to conclude that those programs that fail this criterion are therefore unfair, among other reasons, for this does not help us much to distinguish earnest reparations efforts from those that are simply a sham. Rather than taking this route, the project takes a fresh look at the legitimate goals of reparations programs and at the very meaning of the term 'reparations' with the aim of articulating a conception of

justice that is both normatively thick (so that it can be deployed critically) and empirically informed (so that it does not abstract from the peculiarities of transitional contexts, foremost amongst them, that there is a difference between awarding reparations within a basically operative legal system of which in the relatively isolated case of abuse it can be said that it should have, and could have, fared better and, on the other hand, awarding reparations in a system that in some fundamental ways, precisely because it either condoned or made possible systematic patterns of abuse, needs to be reconstructed, or, as in some countries, built up for the very first time. In the former case it makes sense for the criterion of justice to be exhausted by the aim to make up the *particular* harm suffered by the *particular* victim whose case is in front of the court. In the case of massive abuse, however, an interest in justice calls for more than the 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 aim that has a public, collective dimension).²⁸

If the case studies in Part I are novel, not the least because some of them constitute the first and only sources of information on these cases, the thematic papers are not any less groundbreaking. Again, without pretending to provide a full summary of their contents, in most cases they tackle questions that have not been addressed elsewhere and that are of deep theoretical and practical interest. Amongst the unexplored issues one can include the relationship between material compensation and symbolic reparations—an issue that has become particularly pressing as reparations proposals become increasingly complex; the seemingly emerging trend of including the provision of mental health care in reparations benefits; the complicated set of questions around the treatment by reparations programs of victims of sexual violence;²⁹ the possibility of establishing productive links between reparations benefits and microfinancing plans, so as to increase the impact of even modest benefits and to give them some sustainability particularly in economically deprived contexts; and a comparative analysis of the critical issue of how to finance massive reparations programs, a topic that could have been expected to receive close attention before, but has not.

The authors of the chapters in Part II benefited not just from the information in the case studies but also from one additional factor that was intentionally built into the project design: as the research project progressed, the International Center for Transitional Justice (ICTJ), including the Research Director, was involved in advising countries facing the task of implementing reparations programs. This allowed the Center both to feed into these processes the results of the ongoing research, and, more importantly for this project, to fine-tune the research questions in light of some of the real challenges that were being faced on the ground. In this sense, this project is no mere ‘academic’ exercise. Indeed, the conception of justice in reparations articulated here has been adopted (and adapted) in the

chapter on reparations in the report of the Peruvian Truth and Reconciliation Commission,³⁰ by the recent Commission on Illegal Detention and Torture in Chile,³¹ by the Truth and Reconciliation Commission for Sierra Leone,³² and by various international documents, for example, the 'Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity', by Diane Orentlicher.³³ The collection includes the most careful articulation of this way of conceptualizing the aims of reparations.

III

Finally, Part III of this book reproduces some basic documents on reparations. Just as Part I did not attempt to become an exhaustive set of case studies examining each and every reparations program ever established, but rather, provides a range of interesting examples, Part III is motivated by a similarly frugal attitude. This part does not aspire to provide an exhaustive list of documents. It does not include, for example, basic international documents on the subject such as the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'³⁴ recently adopted by the UN Human Rights Commission, nor any of the other important international legal instruments on the topic. These documents are not only easily accessible, but reprinted in many other sources, so given the magnitude of this project also, there is no sense in reproducing them here as well. On the same grounds, the collection does not reproduce documents that pertain directly to some of the papers here, such as the case study on the UNCC or the paper on the Inter-American System. Both institutions disseminate their documents widely both in hard and in electronic versions, and the electronic archives have advanced search functions that make moot any editorial process of selection. These archives, furthermore, will certainly be long-lived.

Part III concentrates on making available not only documents that are directly relevant to the chapters in Part I and II and that are illuminating to those who are thinking prospectively about the design and implementation of reparations programs, but also documents that either are difficult to find, or have not been translated into English before. Thus, among other documents, it includes legislation from Argentina, Brazil, Chile, and Germany that is translated here for the first time, as well as documents from Haiti, Malawi, and South Africa that perhaps are

not so easy to find. Neither total comprehensiveness nor the desire to achieve great historical depth was the selection criteria used for this part of the collection. Here as elsewhere, this project is interested not only in looking backwards but also in helping us move forward.

NOTES

1. It is not just transitional societies that are considering or have actually implemented programs of reparations. Many non-transitional societies are dealing with the issue. A recent 'best seller' on the topic talks about 'a new international morality' characterized by 'the willingness of the perpetrators to engage and accommodate the victims' demands'. What the author finds especially noteworthy about some of these cases is that they 'involve no coercion but rather evolve from the perpetrators' willingness to acknowledge, and choice to compensate, their victims or their descendants': Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000), ix.
2. This used to be the title of the project as a whole before it became *The Handbook of Reparations*.
3. Thus, the judicial resolution of individual and sporadic cases of abuse is not the main focus of the project either, although this topic is the subject of detailed examination in several chapters below.
4. The following list of categories tracks closely but also refines and corrects the taxonomy I presented in 'Reparations Efforts in International Perspective; What Compensation Contributes to the Achievement of Imperfect Justice', in *To Repair the Irreparable: Reparation and Reconstruction in South Africa*, Erik Doxtader and Charles Villa-Vicencio, eds. (Claremont, South Africa David Philip, 2004), and in 'Redressing the Past: Reparations for Gross Human Rights Abuses', in *Rule of Law and Conflict Management: Towards Security, Development and Human Rights?* Agnes Hurwitz, ed. (New York: International Peace Academy, forthcoming).
5. The numbers of beneficiaries, of course, need not correspond to the number of victims of human rights abuses in any given case, not only because a program may fail to provide benefits to all victims (as almost always happens), but also because the program may count as beneficiaries relatives of victims, that is, people who are victims in a 'secondary' or 'indirect' sense, not always counted among victims in the 'primary' or ordinary sense.
6. 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 *Informe de la Comisión Nacional Sobre Prisión Política y Tortura* (Santiago, 2004).
7. See the paper on Argentina by María José Guembe (Chapter 1, this volume).
8. Law 23.466 (1986) and Law 24.411 (1994). These laws and those referred to below are reproduced in Part III of this collection.

9. Decree 70 (1991), and Law 24.043 (1991).
10. Law 25.914 of August 30, 2004.
11. See the paper on South Africa by Chris Colvin (Chapter 5, this volume).
12. *Promotion of National Unity*, sec. 1(1)(xix)(a), 1(1)(ix).
13. See, for example, Mahmood Mamdani, 'Reconciliation Without Justice', *Southern African Review of Books* Nov. Dec. 3–5 (1996).
14. I am grateful to Paul van Zyl for conversation about these issues.
15. Article 1, Law 9,140/95. See the paper on Brazil by Ignacio Cano and Patrícia Ferreira (Chapter 3, this volume).
16. See Law 19.123 of 8 February 1992, reproduced in Part III.
17. The relevant laws, in addition to the Luxembourg Agreement, were passed in 1953, 1956, and 1965. Part III reproduces the Luxembourg Agreement and extended excerpts of the 1956 and 1965 laws.
18. See the paper on German Holocaust reparations by Ariel Colonomos and Andrea Armstrong (Chapter 10, this volume).
19. See the paper by John Authers on German reparations for concentration camp inmates (Chapter 11, this volume).
20. See my 'Truth-Telling and the Rule of Law', in *Telling the Truths: Truth Telling and Peacebuilding in Post-Conflict Societies*, Tristan Anne Borer, ed. (Notre Dame, IN: University of Notre Dame Press, 2005).
21. 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 the CONADEP Report, 'truth trials', and other means, and from institutional reforms that were taking place in Argentina as the reparations laws were being enacted and implemented.
22. As I indicate in my paper in Part II of this collection (Chapter 12), I distinguish between 'reparations efforts' and 'reparations programs'. 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. Reparations benefits are most often the result of discrete initiatives that come about incrementally rather than from a deliberately designed plan. When no harm is done I use the terms interchangeably.
23. Civil litigation thus raises the risk of entrenching prevalent social biases. Wealthier, more educated, more urban victims usually have a higher chance of successfully pursuing reparations litigation in civil courts than poorer, less educated, more rural individuals, who may also happen to belong to less favored ethnic, racial, or religious groups. For a contrasting perspective on this issue, see Jaime Malamud-Goti and Lucas Grosman, 'Reparations and Civil Litigation' (Chapter 15, this volume). 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.
24. 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.

25. 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 are a case in point.
26. 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.
27. In the sample of cases included in this collection, only the September 11 Fund has arguably satisfied this criterion of justice. As Issacharoff and Mansfield argue (Chapter 8, this volume) however, it is not clear that the Fund is a reparations program in any ordinary sense. Moreover, interestingly, the fact that this criterion of justice *was* satisfied has not exempted this program from the problems that have usually plagued procedures that individualize the treatment of claims.
28. See my paper in Part II (Chapter 12), as well as the papers by Hamber (Chapter 16), Falk (Chapter 13), Carrillo (Chapter 14), Malamud-Goti and Grosman (Chapter 15).
29. The general topic of gender and reparations has, indeed, become the subject of a new two-year research initiative at the ICTJ.
30. See Comisión de la Verdad y Reconciliación, *Informe Final* (Lima, 2003), vol. 9, ch. 2.
31. See *Informe de la Comisión Nacional Sobre Prisión Política y Tortura* (Santiago, 2004), ch. 9.
32. See *Report of the Truth and Reconciliation Commission for Sierra Leone* [Presented to the President of Sierra Leone on October 5, 2004], vol. 2, ch. 4.
33. UN Document E/CN.4/2004/88, February 27, 2004.
34. UN Document E/CN.4/2005/L.48, April 13, 2005.