

Truth, Reconciliation, Compensation Lessons, Wishes and Warnings from the South

*Fanie du Toit**

Transitional justice (TJ) seeks to build accountability for political crimes during times where a relapse into excessive violence is a real risk. With stability in the balance, the need is for flexible processes with enough political compromise to keep spoilers on board and assuage minority fears, but with enough moral substance to assure all citizens, not least victims, of a better future.

With justice systems often badly damaged, the focus shifts to quasi-legal mechanisms with the ability to reach an audience beyond the political elite. Transitional justice offers a statement about the values and rights of a society yet to be born. It is essentially popular, seeking to generate widespread support for its message – at the same time as it nurses tender political compromises.

The TJ-specific focus is on international crimes. International crimes are crimes against humanity (crimes against population groups), war crimes (crimes against captured combatants and non-combatants), and genocide (the decision to exterminate population groups), and in future we expect that a fourth crime will be added: crimes of aggression and crimes against peace will become a jurisdiction on the International Criminal Court (ICC).

TJ also entails specialised forms of accountability adapted to cope with extraordinarily high numbers of casualties, as well as evident barriers associated with conditions of war where evidence is often very hard to come by. TJ is furthermore adapted to operate within transitional political frameworks designed to guide a country from war or oppression to democracy and human rights.

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As in most spheres, transitional politics needs to tread carefully as it balances demands for justice with needs for reconciliation. The mediating principle between justice and reconciliation is often seen as truth. ‘Truth’ – defined as public information about past atrocities – is viewed by some as a first step towards the demands of comprehensive justice, both for victims (who are offered a chance to mourn properly and to be acknowledged publicly) and for perpetrators (who are often socially ostracized by having to acknowledge their misdeeds publicly). Truth is also understood as the first step towards the mutual understanding required building durable reconciliation. Successful transitions are measured most immediately in terms of putting an end to violence, building a framework for negotiations and achieving inclusive constitutionality.

The jury is still out on longer-term evaluations, certainly for prominent cases such as South Africa and Chile. The question is how constitutional inclusivity is deepened into social reconciliation and material equality and how transitional justice mechanisms, as the seedbed of the constitutional order, can point the way.

Beyond direct victims and perpetrators, indirect victims and beneficiaries are offered a public spectacle as a first stepping stone to a shared understanding of the past, even if this is only in the minimal sense of being forced to listen to, and acknowledge different histories.

The reparations and memorialisation questions cut to the heart of the transitional justice agenda, to efforts to achieve justice for victims of gross human right violations during or immediately after mass atrocities.

This is so because reparations and memorialisation are victim-focused endeavours. Of course, bullets, machetes and bombs are also victim-focused, but reparations and memorialisation target victims, not in order to destroy or harm them again, but in order for such harm and destruction to be arrested and, to the degree possible, reversed.

More so perhaps than any other single item on the transitional justice agenda, reparations are subjected to a reckless idealism within the international community, where ideals and norms are repeated over and over

again – often victims who have nothing or next to nothing left – without anyone or any institution developing concrete capacities to turn such “good ideas” into reality. And so, victims are left re-traumatised and disillusioned after learning of an abstract “right to reparations” without anyone taking the trouble to assume responsibility for correlating duties which such rights imply.

The South African experience

I am loath to offer a dispassionate exposition on the formal characteristics of what reparations ought to look like for a second reason. This could create the impression of an “expert” with privileged knowledge sharing international blueprints and best practises with those yet to learn these things, whereas the reality is different: in fact, I believe one can only really understand and appreciate the incredibly complex dilemmas inherent in seeking to redress gross injustice, when one acknowledges oneself, not as expert somehow detached from real life examples, but as a participant and actor within history and with such drama. It is primarily from *within* that solutions need to be found, whilst not eschewing or ignoring the voices and insights from without. And in this sense, I would like to talk with you – rather think *with* you – as a South African whose own country is in the midst of a protracted and controversial reparations and memorialisation process that remains very much unfinished business, but also as an Afrikaner whose family for many generations benefited from unjustifiable privilege, but who has not been required officially to pay any reparations for this privilege. To do so in any other capacity would simply be to further the very denial that reparations and memorialisation are designed to end.

This is not to say lessons in the international arena have not been learnt, and some insights gathered, (which I am happy to share), but it is unequivocal that reparations programmes remain by and large ineffectual and inadequate, not because they cost too much money, but because they demand acknowledgement from an entire society of its own failure to protect its most vulnerable, whether as active perpetrators, or as silent beneficiaries, or simply as indifferent bystanders. And very very few political situations allow for such candour and courage. You alone can

be the judge of whether Kenya stands ready to look its victims in the eye, take their hands, and say sorry to them with a chequebook in the hand.

The climate conducive to reparations needs to be one of self-awareness, of having understood its own failures, of shock even. If such acknowledgement is absent, reparations and proper, inclusive and fair memorialisation processes are doomed to failure.

This may be why reparations in South Africa have been so inadequate and why memorialisation, though marginally more successful, is beginning to display signs of one-sidedness and exclusion rather than inclusivity and fairness.

The Truth and Reconciliation Commission was a non-judicial measure in South Africa that operated from 1996-1998 to address political crimes committed during apartheid, provide reparations to victims of these crimes and administer conditional amnesty to self-confessed perpetrators. Apartheid was a system of legally enforced racial segregation that stripped black South Africans of their civil and political rights. Popular resistance was met with political violence and police brutality.

After protracted negotiations an interim constitution was passed in November 1993, which paved the way for the country's first democratic elections in April 1994. The TRC was designed as a mechanism to embody the profound political change toward inclusivity and fairness, but was also created to investigate human rights violations, including abductions, killings and torture. The victims of human rights violations were invited to hearings which aimed to find out more about "the truth" about political crimes under apartheid. Victims were required to give a statement about their experiences in public hearings, and were promised reparations – the first time ever this had been done.

The TRC was tasked to create as complete as possible a picture of the past with a careful balance between justice and truth. The work of the TRC was divided into three committees (Human Rights Violations Committee, Reparation and Rehabilitation Committee, The Amnesty

Committee) and comprised of seventeen commissioners. Archbishop emeritus Desmond Tutu chaired the commission.

The TRC was authorized to invite victims to participate in public hearings and to grant amnesty from criminal prosecution under certain conditions – such as full disclosure, proof of political motivation and proportionality of the crime to the political goal.

Transitional Justice in international crisis management

Transitional Justice describes measures, processes and institutions tasked to address the legacy of mass violence. High numbers of people are killed – that is why TJ becomes an issue and accountability has become a key ingredient of peace.

Establishing peace and security in a society marked by war and violence is the basic assumption of TJ concerning the processing of human rights abuses and war crimes, which also signals a clean break with the forgoing violent regime.

Internationally the military presence of international peacekeepers (peacekeeping operations) is growing in importance. The Responsibility to Protect (R2P) right to protect and the chapter 7 interventions of the UN will increase, but at the same time there is a higher standard of accountability for soldiers. It means the soldiers are no longer able to offer the “following orders“ excuse on the ground and the commandants are no longer able to say “my hands are clean“. Anyone in the line of command, high or low, who is involved in war crimes, can be found guilty by the ICC or a similar court or tribunal.

The Rome Statute of the ICC signed in 1998 is an important step forward, but there are also growing pains in the international system. There are many NGO's which sing the ICC's uncritical praises. The world needs a court like the ICC, but we need to make sure that difficult questions such as “Whose justice does the ICC serve?“ and “What should the role of the UNSC be?“, or “What are the limits of law as an instrument

of TJ?‘‘ ought to be raised by all those who call themselves friends of international justice and the ICC.

If you think Transitional Justice is a small academic exercise – think again! All of these countries had a national legislation to the term of reconciliation – so it is no longer a quasi concept, it has actually become a statutory concept.

<p><i>African Union (AU) Post-Conflict Reconstruction and Development Policy framework</i></p> <p><i>SOUTH AFRICA’s Promotion of National Unity and Reconciliation Act number 34 of 1995</i></p> <p><i>GHANA’s National Reconciliation Commission</i></p> <p><i>International Criminal Tribunal for RWANDA (ICTR) & Organic Laws to manage national trials and Gacaca</i></p> <p><i>MOROCCO’s Equity and Reconciliation Commission</i></p> <p><i>Special Court for SIERRA LEONE and the SL TRC</i></p> <p><i>LIBERIAN TRC</i></p> <p><i>DRC TRC, ICC indictments, gender courts</i></p> <p><i>ALGERIA’s charter for Peace and National Reconciliation, 2005</i></p> <p><i>IVORIAN Commission for Dialogue, Truth and Reconciliation</i></p> <p><i>UGANDAN National Reconciliation Bill (under debate) as well as a Commission of Inquiry into the Disappearance of the people of</i></p>	<p><i>KENYA’s Truth Justice and Reconciliation Commission (Act no. 6 of 2008 founded on Agenda Four (4) of the 2008 National Accord) & National Cohesion and Integration Commission</i></p> <p><i>ZIMBABWE’s Organ for National Healing, Reconciliation and Integration</i></p> <p><i>EGYPT: Following the popular protest in January/February 2011, the constituted interim government of Egypt set up a commission of inquiry to investigate violations that occurred during the protests. Ongoing dialogues around national transitional justice mechanisms.</i></p> <p><i>SOUTH SUDAN’s Sudan Peace Commission, 2011</i></p> <p><i>MAURITIUS’s Truth and Justice Commission</i></p> <p><i>TUNISIA was launched a national dialogue by the ‘troika’ President of the Republic, President of the National Constitutive Assembly and Prime Minister in 2012 to draft a law dealing with transitional justice. A Ministry of Human Rights and spe-</i></p>
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<p>Uganda, 1974 (possibly the first national truth commission to be established), Commission of Inquiry into Violations of Human Rights, 1986, indictments of the LRA by the International Criminal Court, and the establishment of an International Crimes Division within the High Court of Uganda.</p>	<p>cifically for Transitional Justice has been established. The National Constitutive Assembly is expected to adopt a law on transitional justice by the end of 2012. In <i>LIBYA</i> International Criminal Court issued indictments in 2012 <i>BURUNDIAN</i> TRC (under debate)</p>
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There are three important concepts to measure TJ with the potential to provide guidance:

Truth, Reconciliation and Compensation

Truth

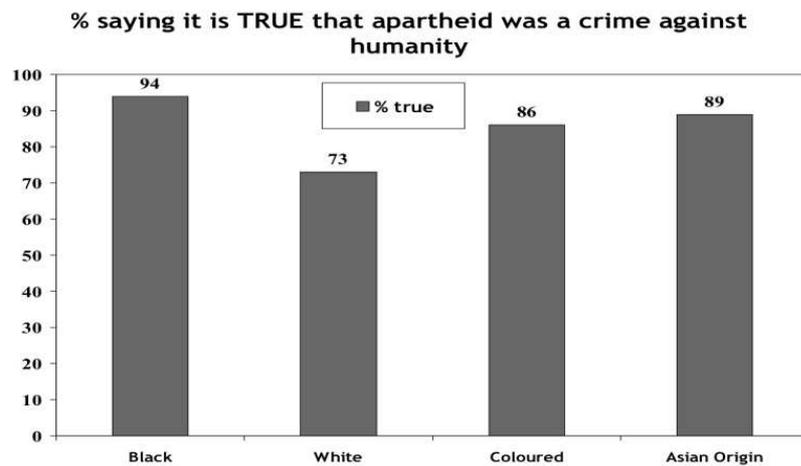
In South Africa the torturers said to the victims: You can scream as loud as you can, nobody will hear you. The key role of the TRC is to break the silence and to bring the victims' truth to the public stage.

Finding truth is the TRC's challenge and the South African Commission distinguished between four types:

- First, forensic truth is based on facts. The TRC tried to uncover the truth with questions like: What happened to whom, where, when, how and who was involved?
- Second, personal or narrative truth describes the truth of personal collection and memory. The personal experiences are integral to the truth that leads a new justice.
- Third, social truth is formed from experience that is established through interaction, discussions and debates. The stories they told publicly form a societal truth.
- Fourth, "healing" truth describes the exposing of the past events in order to raise a public awareness of atrocity and to elicit a "never again" position toward such atrocities resulting in a healed or reconciled society.

The TRC's report basic double message was: the war against apartheid was justified, but this war also produced human rights violations on all sides.

The South African Reconciliation Barometer is an annual public opinion survey of the Institute for Justice and Reconciliation that consults 4,000 South Africans in 6 languages across gender, race, income groups, urban and rural settings and age groups. It has been running for ten years.



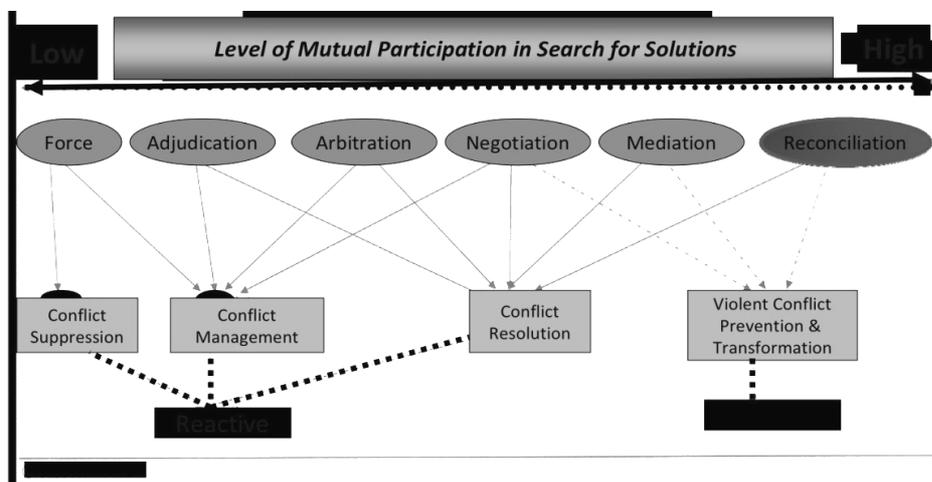
Results from the SA Reconciliation Barometer survey shows that 94% of black South Africans classify apartheid as a crime against humanity. This is perhaps expected, but less so was the 2001 finding that 73% of the whites agreed that apartheid was a crime against humanity. This acknowledgement, I would argue, was largely due to the work of the TRC at the time.

Reconciliation

Reconciliation is one of the main constituents of a successful transition in a society marked by violence. At a basic level it can be defined as the acknowledgement of, dialogue about, and implementation of radical

interdependence that exists as a hallmark of human society at all levels, but especially between enemies or political opponents.

Peacekeeping is often the first concrete step in addressing violent conflict on the ground. For this, the participation of international actors together with credible local institutions are required.



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(left side forced peace and the right side owned peace)

Adjudication, arbitration, negotiation and mediation require increasing levels of involvement by conflict groups on the road from conflict to reconciliation. In comparison with the global military expenditure, the UN mediation or peacekeeping expenses are only a fraction which may serve to show that the UN priority is with reactive peace-keeping initiatives rather than proactive conflict prevention through mediation and diplomacy.

The South African Reconciliation Barometer (SARB) is the only survey in South Africa at present that provides a longitudinal measure of progress in reconciliation since the transition to democracy in 1994. The SARB Survey developed six central hypotheses and selected indicators:

1. Human security: If citizens do not feel threatened, they are more likely to be reconciled with each other and the larger system.

Three indicators impact this hypothesis: physical security; economic security; cultural security.

2. The second hypothesis is concerned with the political culture. If citizens accept the institutions, leadership and culture of the new system as legitimate and accountable, reconciliation is more likely to progress. The four indicators in this regard are justifiability of extra-legal action; legitimacy of leadership; legitimacy of parliament; respect for the rule of law.
3. Cross-cutting political relationships suggests that, if citizens are able to form working political relationships that cross divisions, reconciliation is more likely to advance. The indicators in this regard are commitment to national unity; commitment to multi-racial political parties.
4. Historical confrontation proposes that, if citizens are able to confront and address issues from the past, they are more likely to be able to move forward and be reconciled. SARB Survey's indicators are an acknowledgement of the injustice of apartheid; forgiveness was needed; reduced levels of vengeance.
5. Race relations: If citizens of different races hold fewer negative perceptions of each other, they are more likely to form workable relationships that will advance reconciliation. Three indicators have been used in this regard: inter-racial contact; inter-racial preconceptions; inter-racial tolerance.
6. The social dialogue contents, if citizens are committed to deep dialogue, reconciliation is more likely to be advanced (Commitment to more dialogue).

Finally, to ensure a successful reconciliation it is important to know what motivates and what constitutes success in political reconciliation. Reconciliation begins as adversaries recognize their interdependence as a source of shared and comprehensive wellbeing. Conversation is one of the most difficult issues of a country in transition, as erstwhile enemies are required to debate and negotiate the root causes of the conflict in a process of ebb and flow that requires both opening difficult issues and finding ways to consolidate them in order to keep moving ahead.

Reconciliation is ultimately justified, judged and measured by its ability to fulfil the promise of comprehensive justice.

A Brief description of Reparations

In 2006, the United Nations approved a groundbreaking resolution entitled *The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (UN Basic Principles). This is the most comprehensive legal instrument to date which sets out, in systematic fashion, the means and methods by which victims rights can be addressed. It was only in the last five to six years that states, including poorer states, have initiated reparation programmes for relatively large victim populations. During this time, it has become increasingly clear that each case requires a unique bouquet of measures, rooted in context-specific approaches to reparation.

Principle 15 of the *UN Basic Principles* states that effective reparation ought to be made to victims of an applicable international human rights or humanitarian law norm, payable either directly to the victim, or to family and dependents, or to those who suffered harm in seeking to prevent violations. Furthermore, reparation should be proportional to the harm suffered. This internationally recognised right to reparation provides the term ‘victim’ with legal as well as moral significance. On the one hand, it indicates a *legal* right to reparations, enforceable in a court of law, and, on the other hand, it designates a *moral* right to reparations, not because of legal status in the first place, but because of sympathy and solidarity with those suffering. In post-conflict situations, designations of individuals and groups as ‘victims’ have important political implications by either legitimising or delegitimizing political elites as a result of their actions during the conflict.

The document further recognises four kinds of victims:

1. those who suffer harm directly;
2. dependents of family members of direct victims;
3. collective victims such as organisations or institutions; and
4. individuals injured in an attempt to prevent violations.

There are also four principle forms of reparation available for violations of international human rights and humanitarian law, namely restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.

- Restitution seeks to restore victims, wherever possible, to the state before the violation occurred. Examples include restoring liberty and human rights, or returning to its rightful owner a place of residence, employment or other forms of property.
- Compensation, in turn, includes those measures designed to address financial and other forms of material damages, such as physical or mental harm, lost opportunity of education or employment, material damages including earning potential and moral damage.
- Rehabilitation provides for medical care as well as social services. It includes addressing victims' psychological and legal needs.
- Satisfaction and guarantees of non-repetition involve effective measures to aid the cessation of violations including peacemaking, reconciliation and institutional reform, verification of facts and violations, and full public disclosure to the extent that it serves the interests of victims; the search for the disappeared, exhumation and reburial, restoration of the legal status, reputation and rights of victims, public apology, sanctions and finally efforts to memorialise and honour victims.

In line with arguments developed elsewhere in this volume, it stands to reason that the fourth dimension of reparation is often the most fundamental. Without guarantees of non-repetition, reparation programmes can deteriorate to 'quick fix' solutions that do more to satisfy the moral need of perpetrators to be forgiven or for bystanders to 'do something', than to actually benefit victims. It is vital for its credibility that both reparations' symbolism and benefits are shaped by victims' concerns. It is from *their* eyes, and to acknowledge *their* suffering and dignity, that reparations should be conducted.

This implies that reparations mean taking responsibility for what went wrong, saying sorry and providing guarantees of non-recurrence – hence the reluctance of governments and companies to pay reparations. This feature points to a major difference between reparation programmes and development programmes: the latter do not come with acknowledgement of complicity and moral duty as do the former. It therefore lacks the element of satisfaction victims typically experience from an admission of culpability linked to payment of reparation.

Arguments *for* reparations and memorialisation

Reparations and memorialisation are more than “good things to do” – the failure to do them constitutes immoral behaviour and the courage to pursue them, *moral triumph*.

If we accept that society always has some guilt when some of its members are subjected to gross violence, then society has a moral duty to restore the human dignity of victims in ways that not only the victims can recognise as such, but that society at large can “own” and recognise. A society that has allowed its members to be treated as less than human has the moral duty to restore the human dignity of such victims – but this also has an unintended consequence, which is that the dignity of society as such benefits, and is restored after periods where it is harmed by its own actions.

Apart from the moral argument, there is also a compelling *political argument*: Both reparations and memorialisation are essential in receiving victims back into society as full citizens after a period of unjustified violence towards them that questioned, or even cancelled, their membership of society. Without seeking, at least to some degree, to rectify the harm done or to capture their memories in public spaces, it is difficult to see how victims are to be reinstated as full members of society. A political transition that does not result in the re-instatement of all who live in a country including victims as full citizens, is a morally questionable transition.

Then there is a crucial *historical argument* for reparations and memorialisation as the ways in which a nation learns to know itself. South Africa's development in this regard is highly instructive. Apartheid, of course, developed its own history, a story of a divinely-inspired heroic tale of Afrikaner trekkers who spread God's word and civilization – as a result of their quest to be free from British colonialism. Always fighting against impossible odds (whether it was the 'red jackets' of Her Majesty's Army or the 'savages' of Shaka's army) the Afrikaners had survived, so the story went, because they feared God and possessed superior bravery and survival skills. This too, is the narrative that I was taught at school – and which democratic South Africa had to deconstruct.

In its place came the story of liberation of how thousands of South Africans of all persuasions fought apartheid with bravery and exceptional skill and how they conquered under the leadership of Nelson Mandela. This story became an important component of our reconciliation and nation building efforts, not only because of its noble ideals and 'happy ending' but also because of its unifying force. Emerging from apartheid, South Africa needed common ground on which to begin to build and the liberation narrative provided this for most South Africans of goodwill.

Enter the TRC. With its dramatic victim narratives, the TRC once and for all deconstructed the apartheid claim that presented itself as a selfless and noble plan for the good of all. Apartheid's small underhandedness, its petty cruelty (what Hannah Arendt called the banality of evil), its lying and ultimately its sheer destructiveness was made plain for all to see and never forget. More unexpected, however, was the TRC's impact on South Africa's proud liberation story – for here too, it unearthed pettiness, violations of human rights, and cruelty. In the face of fervent criticism from sections within the ruling party, the TRC nevertheless held its line: that a just war does not justify violations of human rights – and that all perpetrators needed to be called to account, regardless of whether they were fighting a just cause or an unjust one. So, when the IJR developed South Africa's first post-apartheid history books covering the entire sweep of the country's past, it faced the challenge of redressing apartheid's one-sided and racist history and telling the story of South

Africa's liberation, whilst avoiding the trap of glorifying a new history in much the same way as the old one had been. It had to write a history in which South African learners could learn their common past, but also about one another's stories in all their humanness, imperfection, and limitations – warts and all.

Finally there is a legal argument for reparations. It is a longstanding principle of international law that a state has the primary obligation to provide for reparations to its nationals whose human rights have been violated by the state and/or non-state actors within its territory. (2006 UN Basic Principles, Principle 15)

State responsibility for the right to reparations for victims presupposes that the state must create mechanisms so that its nationals have access to this right. *“States should endeavor to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”* (2006 UN Basic Principles, Principle 16)

The Rome Statute of the ICC establishes the right to reparations for victims of international crimes. The ICC has recently made a landmark ruling on the principles of reparations to be followed in the Thomas Lubanga case, who was found guilty of the war crime of enlisting and conscripting child soldiers. The principles established by the ICC particularly stress the need to ensure that reparations should be directed at reconciling the victims of child recruitment and their families and communities in Ituri, whilst preserving their dignity and privacy. The reparations for victims in this case will be implemented through the Trust Fund for Victims (TFV) and require the cooperation of states including the DRC. The TFV has limited funds and it is not immediately clear, how reparations in this case will be given to the specific victims of the case or, indeed, to the communities affected, if at all. The ICC interprets the conviction and sentence of Mr. Lubanga as symbolic reparation, given that these events are likely to have significance for the victims and their families and communities.

There are challenges with the established reparations regime, but the systems nevertheless are set up to redress harm caused victims.

Lessons Learnt

1. Consultation

Victim consultation remains essential, because victims know best what their needs are and what would count as adequate restoration of their human and civic dignity. Comprehensive, empathetic and accurate consultation processes are essential in the run-up to any reparation programmes.

2. Symbolism

In the African context with little realistic possibility that significant proportions of its victim community will benefit directly from monetary reparation (due to a combination of weak local government, high numbers and unaccountable foreign actors) an important consideration remains how to conduct symbolic reparations more effectively – in order to emphasise the value of human dignity and to acknowledge the need to restore the dignity of victims of past violence. Appropriate forms of recognition have a powerful, well-documented impact on victims, indeed helping to restore to some degree, their lost dignity as citizens and as human beings. In this regard the restoration of place names, memorials and monuments, exhumation and reburial ceremonies, traditional reintegration and conflict mediation ceremonies, oral history and education programmes and official apologies all carry significant meaning for victim communities in Africa.

3. Tangible Benefits

At the same time, realistic, but tangible benefits ought to be part of reparation programmes, not least because political violence so often has tangible, material consequences. In this case, monetary payments are obviously of great worth, but often unrealistic. However, restoration of stolen property, effective land restoration and targeted social services ought to be achievable.

4. *Lack of Political Will*

Overcoming the almost endemic lack of political will of ruling elites across the world to acknowledge wrongdoing and/or pay reparations remains a fundamental challenge. It is noteworthy that in the above list of cases, *reparations after civil war* have fared the worse – Sierra Leone, Liberia, Uganda and Sudan all have failed to implement reparation programmes recommended by national commissions. May this be due to the ways in which civil war leaves no hands clean and implicates actors from all sides in gross violations of human rights? It is perhaps therefore not surprising that South Africa, Morocco, Ghana, Malawi and Rwanda have all to varying degrees fared modestly better. These countries dealt largely with violations which had occurred under a previous, discredited regime on which most, if not all, the blame could be laid. It is further plausible to deduce that the degree to which Ugandan, Nigerian and South African politicians currently in power had nonetheless *also* been implicated in human rights abuse during their respective liberation struggles may have slowed reparations in these countries. By contrast, Morocco dealt more clearly only with the abuses of a previous regime, and therefore may have proceeded more smoothly.

5. *Independent Agencies*

If these observations holds true, it is more important to negotiate for independent implementing agencies and financial parameters for African reparation programmes in the future, so as to have binding political commitment and independent oversight guaranteed ahead of truth commissions or other investigative bodies. It is clear that waiting on governments to make good on vague commitments without external oversight mechanisms in existence is a recipe for prolonged disappointment and a further undermining of civic and human dignity in victims and their communities. Finally, victim support groups ought to consider ways to built capacity, to avoid infighting, to enhance transparency and to make realistic, creative demands. In essence, theirs is the task to provide a bridge between victimhood, marginalisation and dependency, to fully affirmed citizenship and realised human potential of those who suffered most unjustly from political violence.

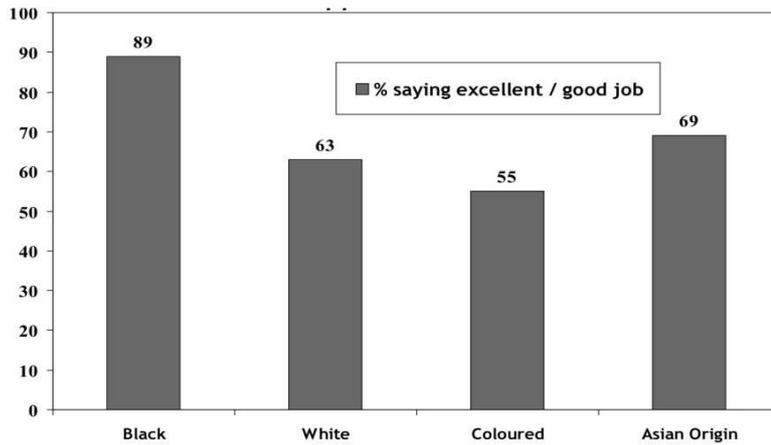
Benchmarks

Pablo De Greiff helpfully suggests a set of benchmarks against which future reparation programmes could usefully be measured. These include:

- **Scope:** Scope is determined by how many victims a specific context has to address. Reparations can serve large or relatively smaller numbers of victims.
- **Completeness:** Reparations ought to serve as many victims within a particular setting as possible.
- **Comprehensiveness:** There is not yet consensus on a list of crimes to be addressed through reparations. The obligation to pay reparations after forced displacement, for example, remains uncertain. Existing programmes all have been incomplete in one way or another. There is a trend towards developing progressively more comprehensive programmes.
- **Complexity:** A programme is more complex if it distributes a larger number of different types of reparations. These types were described earlier in this chapter. Complex reparation programmes are to be welcomed up to the point where the complexity becomes an impediment to implementation.
- **Coherence:** A reparations programme needs to display internal consistency (with different measures serving the same goals) as well as external consistency (with other measures such as post-conflict development agendas or other transitional justice measures such as accountability mechanisms, etc).
- **Finality:** Some reparation programmes imply that victims forsake any further rights to claim redress, while others do not. In some cases (where political stability is fragile) it may be desirable for reparations to constitute a 'final' claim, whereas in other contexts it may not.
- **Munificence:** This indicates the monetary value of reparations, but does not necessarily constitute a measure of success, as the symbolic aspect of reparations (whether or not payments are accompanied by genuine expressions of acknowledgement and remorse) remains essentially important too. At the same time, in-

adequate monetary compensation may stoke further resentment and disappointment and may even be interpreted by victim groups as an insult.

The SARB Survey asked, for example, black and white South Africans, what they thought of the performance of the TRC in letting the families of people know what happened to their loved ones: And that is a very important aspect – you can see how positive the South Africans rated the TRC’s work.



Transitional Justice, Social Transformation and Security Sector Reform

After the end of apartheid there was strong pressure for tribunals such as Nuremberg or Tokio. South Africa is unique in that the form of accountability that it chose was not based on classic legal justice, but more on the notion of restorative justice that entailed conditional amnesty as a means for the perpetrator to be held accountable, but also to be given a possibility to be included in the new dispensation.

The UN approach to Transitional Justice acknowledges both judicial and non-judicial processes and mechanisms such as facilitating initiatives in respect to the right to truth, reparations, institutional reform and national consultations. The UN formally recognizes institutional reform as an

important element of TJ. That means helping to transform the institutions of society, thereby helping to address the root causes of violence and also to ensure non-recurrence as the most important form of reparation.

In South Africa, the amnesty process, as part of a larger reform agenda, aimed to lead social transformation. The transition from institutional reform to social reform could not be obtained. The Gini coefficient has steadily increased in South Africa and this has resulted in the accusation that only the elites benefitted from the transition. The move from institutional reform to social transformation contained important compromises. A very rapid transformation of the public sector came at the cost of efficiency, and inversely, the very slow transformation of private sector came at the cost of equality.

Statistics from the SA Reconciliation Barometer survey demonstrate that the people in South Africa think that the government hasn't done enough to help the victims of human rights violations. At the same time they agree with the opinion that in the South African institutions all races should be represented institutionally.

In this context it is not surprising that one now begins to hear the argument more often that it is more advantageous for the broader population emerging from conflict to invest in institutional reform and security sector reform instead of spending millions on international tribunals for a few chief perpetrators.

In South Africa there had been a relatively positive cooperation between the police and the TRC. The police subsequently demilitarized and integrated both whites and blacks into a single service. Unlike the police, there was very little cooperation between the SADF (Army) and the TRC. It is perhaps no coincidence that the military today lags far behind the police in terms of restructuring and full integration.

At the same time, as is clear from the statistics of the SARB, only 50% of people believe that the government has done enough in terms of law

enforcement. The statistics shows a growing level of confidence in the police sector or in juridical institutions.

Resume

The SA TRC had a number of unique features. Since the TRC there have been 40 truth commissions around the world, but none has adopted the practise conditional amnesty. One of the most important lessons from the South African TRC is to give priority to victims rather than the perpetrators by highlighting victim hearings and their testimonies. The Human Rights Violations Committee heard stories of victims from across the country. It was felt that true reconciliation would only be possible if the true feelings and sentiments of victims were publicly acknowledged, rather than suppressed.

The issue of material compensation or reparation to the victims had been fraught with many difficulties although international law and recently also a ruling by the ICC describe compensation as a legal right. Most of all, the bereaved want the return and proper burial of their relatives' remains, or a memorial in their village, and all agreed that the most important thing was to know the truth.

The aims were to produce a record of the violations of the past and make recommendations to prevent them from ever happening again. It was important to acknowledge the suffering of victims, to offer amnesty to past perpetrators, and to facilitate reconciliation for SA.

A fair trial without the death penalty would be an important signal in such situations. In the case of Security Sector Reform the support from the international community for peacekeeping operations to work together with national institutions is important.