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**Reparation as a Mechanism of Transitional Justice in Southern Africa
A Case Study Analysis**

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MPhil Justice and Transformation
Mini-Dissertation

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November 2007

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Declaration

I declare that this report is my own, unaided work. It is submitted in fulfillment of the requirements of the degree of Master of Philosophy (Justice and Transformation) in the Faculty of Humanities at the University of Cape Town. It has not been submitted before for any degree or examination in any other university.

Signed signature removed

Date November 23, 2007

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Abstract

This study analyzes the politics of reparation as a mechanism of transitional justice through the experiences of Malawi, Zimbabwe, Namibia and South Africa. An in-depth empirical investigation of a limited set of cases, the study seeks to provide a better understanding of policy and programme development and set the stage for subsequent testing and/or policy evaluation of one of the most complex and controversial issues in transitional justice. Scholars and practitioners within the field of transitional justice are increasingly concerned with identifying and assessing the contribution of particular reparation programmes to more general processes of seeking justice, promoting reconciliation and facilitating healing. A patchwork of reparation schemes and case studies based on these is slowly developing and will be explored in the introductory sections of this study. This study draws on general analyses of transitional justice by scholars such as Huntington (1991), Pion-Berlin (1994), and Elster (1998). Theories and analysis of reparation politics, in particular de Greiff (2006), Vandeginste (2003), Brooks (1999) and Barkan (2001), also provide guideposts for comparative analysis of the four cases explored in this study.

The case study analysis is based on historical information, selected primary documents and secondary evaluations, as well as qualitative material from interviews conducted as part of the Southern Research Project at the Centre for the Study of Violence and Reconciliation. The questions addressed in each of the four cases of Malawi, Zimbabwe, Namibia and South Africa are:

- What is the historical background of gross human rights violations and claims for reparations?
- What is the transitional context and what transitional justice mechanisms (i.e. Reparation and Amnesty, Reconciliation, Truth-telling) were utilized (or not utilized) in that context?
- What were the objectives and means, process and outcomes, reception and assessment of the programmes of reparation that were developed?
- In the case where no reparation programme was developed, what was the identified rationale for the non-development of reparation programmes?

The study shows that reparation is not a monolithic concept or policy and cannot be applied uniformly across cases. Strategies and constraints for reparation policy and programme development depend on local political, legal and economic dynamics as well as on the strength of local, grassroots reparation campaigns. In some of the Southern African cases (Malawi, Zimbabwe) reparation was limited to ad hoc measures while in the South African case it was an integral part of a more holistic process. The study finds that broad-based reparation programmes that function as part of a comprehensive national approach to transitional justice, as evidenced in South Africa, are more likely to fulfill the ambitious objectives for reparation, as these are today understood in the international human rights arena.

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Acknowledgments

I would like to thank Professor André du Toit and the Department of Political Studies at the University of Cape Town for accepting me into UCT's graduate program in *Justice and Transformation*. The coursework was enlightening and challenging, and my fellow students were inspiring. Professor du Toit's invaluable counsel and commitment throughout my time in Cape Town, as well as during the lengthy process of writing and editing this mini-dissertation, is greatly appreciated.

Thanks also to Hugo van der Merwe at CSVR for his offer of a research assistant position with CSVR, his confidence in enlisting me to help in this research project, and his advice and friendship along the way.

Finally, thanks to my wife, Ashley, and my family, for their steady prodding, encouragement and support.

University of Cape Town

Preface

The impetus for this particular comparative study – and the relationship of the author to the research – is, in large part, due to Professor André du Toit, Emeritus Professor of Political Studies at the University of Cape Town, and Dr. Hugo van der Merwe, Program Manager at the Center for the Study of Violence and Reconciliation (CSVR), both in Cape Town, South Africa. As a Masters of Philosophy candidate from 2002 – 2003 in the field of *Justice and Transformation* within the Department of Political Studies at the University of Cape Town, I had become interested in the topic of “reparation” to victims of past human rights abuses from my professor and future thesis advisor, Dr. du Toit. Dr. van der Merwe enlisted my help as his research assistant and provided me with the research to deepen my understanding of the issue.

How to “reckon with the past”, as Priscilla Hayner’s colloquial definition of “transitional justice” goes, was in fact a fascination of mine dating back to before I knew anything about “transitional justice”; back to my undergraduate studies of American politics and history and more specifically the American Civil Rights Movement. For many years, I have agreed with what I once read by the American scholar and author, Tim Tyson. Tyson writes this on the topic: “If we are to transcend the past, we must confront it”. That fascination with confronting and reckoning with the past, a fascination turned into yearning to confront the past in order to change the future, was the reason that I found myself in Cape Town, South Africa as a Rotary International Ambassadorial Fellow in 2002 and 2003.

In the course of researching for a case study I was writing on the achievements of the Reparation and Rehabilitation Committee of the South African Truth and Reconciliation Commission, I met Dr. van der Merwe at his CSVR office in downtown Cape Town. CSVR had compiled an abundance of research on the reparation issue intended for use as part of the Southern African Research Project (SARP). The SARP brings together civil society organizations (mainly in the human rights community) from five southern African countries – South Africa, Zimbabwe, Malawi, Mozambique and Namibia – on a five-tiered project covering the following areas vital in the process of a victim-centred reconciliation in times of transition: memorialisation, reparation, victim support services, counseling, and reintegration of ex-combatants/returnees. Dr. van der Merwe invited me to collaborate as a CSVR research assistant on the portion of the study concerning the reparation issue. My portion of the work would serve as the foundation for my MPhil mini-dissertation. Our research project was published (in French) as, “Les Réparations en Afrique australe”, in *Cahiers d'études africaines*, (no 173-174 (2004, vol. 44, no 1-2) May 2004). Hugo van der Merwe and I are co-authors.

The consequence of collaborating with CSVR is that the following case studies draw heavily on civil society documents and victim statements. This was suitable, indeed preferable, for the purposes of the SARP report.

The reader will note that the case studies lean quite heavily on these two types of sources. I believe that presenting the case studies largely from the non-governmental perspective is entirely acceptable in an academic arena given the seminal role of civil society in the process of justice and reconciliation in transitional societies, particularly in Africa. It is my hope that readers of this thesis will agree.

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1. Introduction: Problem Statement and Research Objectives

This study examines the politics of state-sponsored reparation programmes as a core element of “transitional justice”, with particular attention given to the experiences of South Africa and three other Southern African countries – Zimbabwe, Malawi and Namibia. The study is an empirical investigation of a limited set of cases for purposes of theory development to set the stage for subsequent testing and/or policy evaluation. The opportunity for this study is to identify lessons learned from the social-political-economic factors specific to the reparation question as part of the wider transitional justice process. The question of reparation to the victims of past political atrocities and human rights abuses is a conspicuous, though still underdeveloped, feature of contemporary international discourse on overcoming an unjust past.¹ Over the past ten years, there has been increased interest in reparation as a moral imperative as well as an instrument of social justice. As such, this study seeks to locate the experiences of the four countries in southern African within the field of transitional justice and in relation to different main approaches to reparation and restitution.

The interest in reparation as a mechanism of transitional justice is located in the context of political transitions to democracy from authoritarian rule and post-conflict societies. For the purposes of this study the point of departure is a holistic definition, a broad and comprehensive conceptualization, of “reparation” as an inclusive term embracing a number of more specific notions and distinctions. A good starting point is with the etymology, i.e. with the notion of “repairing” something (or someone) that was damaged, as the Latin root *reparatio* suggests. The dictionary definition of “reparation” includes the “act or process of making amends, of offering expiation or giving satisfaction for a wrong or injury”.² Hayner’s broad conceptualisation illustrates clearly that reparation is not a monolithic term:

Reparation is a general term that encompasses a variety of redress, including restitution, compensation, rehabilitation, satisfactions and guarantees of non-repetition. Restitution aims to re-establish to the extent possible the situation that existed before the violation took place; compensation relates to any economically assessable damage resulting from the violations; rehabilitation includes legal, medical, psychological and other care; while satisfaction and guarantees of non-repetition relate to measures to acknowledge the violations and prevent their recurrence in the future.³

The cases receiving the most attention include Argentina, where families of those who disappeared at the hands of the junta were awarded upwards of \$220,000⁴; Chile, where “reparation pensions” and other social benefits were awarded to about 5,000 family members of those killed or “disappeared” under military

¹ This claim that the issue of reparation has yet to garner significant attention in the study of transitional justice is widespread. See, for example, P. De Greiff, “Repairing the Past: Compensation for Victims of Human Rights Violations” (2006) 1.

² Webster’s College Dictionary (1991) 1141.

³ P. Hayner, “Reparations for State Crimes”, in *Unspeakable Truths*, (2001) 171.

dictatorship⁵; and South Africa, where over 20,000 “victims” of human rights abuses during the Apartheid era were given one-off payments alongside the promise of symbolic and communal reparations.⁶⁶ These instances of reparation in the more immediate context of transitional justice should be differentiated from calls for reparation for American slavery, the Australian aborigines, and the Holocaust, for example, in the longer-term context of historical injustices. While the latter is no less important, or in need of further study, than the former, the present study seeks *only* greater understanding of reparations as a mechanism of transitional justice.

With regard to the four cases examined in this study, the South African Truth and Reconciliation Commission (TRC), led by the Chairperson Archbishop Desmond Tutu and the Deputy-Chairperson, subsequent Founder and Director of the International Centre for Transitional Justice, Alex Boraine, has quite possibly received the greatest attention from scholars and policy-makers. Significantly, though, the TRC’s reparation process did not receive much attention, even though this was among its most controversial and least successful components. It is less well known that other countries in Southern Africa, namely Malawi and Zimbabwe, have also pursued reparation programmes, albeit without a TRC. Their experiences with reparation processes have been left largely unexplored in the context of contemporary transitional justice study. Namibia’s political transition from a South African colony to an independent, democratic nation in 1990 received wide-spread attention, but heretofore the government has squelched calls for state-sponsored reparation programmes.

In general, the problem of transitional justice may be defined as that of “how to deal with the past and how to remake a damaged political and social culture through utilizing judicial and quasi-judicial methods.”⁷ Different societies have found different ways of “dealing with the past” ranging from amnesty and amnesia to the lustration or the criminal prosecutions of key perpetrators. The literature on transitional justice has especially focused on the basic options represented by (retributive) “Justice”, on the model of the Nuremberg Trials following the Second World War, and by “Truth”, on the model of the Latin American and South African truth commissions implemented since the 1980s. Along with these, though, the need for appropriate measures of reparation has been widely recognised as a central concern of transitional justice. At the theoretical level, the interest concerns the general moral and political arguments and justifications for reparation. At a practical level, the interest takes the form of developing different reparation schemes within the political, economic and social realities of a particular transitional context.

⁴ J. M. Guembe, “Economic Reparations for Grave Human Rights Violations: The Argentinean Experience”, in P. De Greiff, The Handbook of Reparations, (2006), 41.

⁵ N. Kritz, Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume 1 (1995) 105 - 109

⁶ TRC Report (1998), Vol. 5, Ch. 1

⁷ T. Rosenberg, “Afterword: Confronting the Painful Past”, in M. Meredith, Coming to Terms: South Africa’s Search for Truth (1999) 327.

Reparation to victims of gross and systematic abuse is one of the most complex and controversial issues within the field of transitional justice. It is complex, in part, because the implementation of reparation programs, like all public policy, is dependent on political, cultural and historic forces specific to a given country and at a particular historical conjunction. At a political level, reparation is controversial partly because reparation entails an exchange – a give and take – of money, land or services, as well as an acknowledgment of wrongdoing, and thus it produces denials and justifications, but also losers and winners. Determining who should give and who are entitled to receive are contested matters that can have significant political consequence. Identifying victims and perpetrators is fraught with emotion and difficulty, particularly in cases of large-scale alleged human rights abuses where reparation might result in demands for significant budgetary commitments from government.

Increasingly victims, along with support groups and lawyers, have claimed a *right* to reparation when “crimes against humanity” have been committed either by agents of the State or private individuals / collectivities. According to Barkan, “public awareness of crimes against humanity committed by governments, their effects, and what is done to mitigate those effects, is increasingly translated into political force.”⁸ This is evident in cases such as in Peru, where a Truth Commission has concluded that over 65,000 people died or were “disappeared” from 1980 – 2000 at the hands of an authoritarian government.⁹ Typically victims and their families cry out for reparation and restitution *alongside* the need for truth. For Peru, the process of determining how to “repay” the victims, as part and parcel of realizing justice, is only now beginning and can draw on a range of prior attempts at various forms of reparation to victims of past political atrocities in other cases.

Advances in the last several decades across international legal, political and academic *fora* have established that at a basic moral level crimes against humanity imply the need for redress and that victims of gross violations of human rights have a moral right to redress. International humanitarian law has come to affirm reparation as a right of the victims of human rights abuses. As will be elaborated in Chapter Two, notable examples include the European Convention on Human Rights (1950), the Covenant on Civil and Political Rights (1966), the Covenant on Economic, Social and Cultural Rights (1966) and the Inter-American Convention on Human Rights (1969). Most recently, the Rome Treaty on the International Criminal Court (2001) declares a *right* to reparation, as found in *The Preamble to the Rome Statute of the International Criminal Court*.¹⁰ The most far-reaching international attempt at codifying the right to reparation is the UN

⁸ E. Barkan, *Guilt of Nations* (2000), p. xvii

⁹ S. Wilson, “A Cry for Justice Echoes in Peru”, *The Washington Post* (September 1, 2003).

¹⁰ UN doc. A/Conf.183/9, cited in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court* (2001).

Commission on Human Rights' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, first drafted in 1993. This stipulates that:

Reparation goes to the very heart of human protection – it has been recognised as a vital process in the acknowledgment of the wrong to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law.¹¹

On a normative level, for justice to be served in a transitional context, and for reconciliation and moral reconstruction to be realised, it is not enough just to acknowledge victim suffering. Instead this needs to be combined with actual reparation programmes designed for individual and collective healing, achieved *inter alia* through rehabilitation, compensation and restitution. Today, it is generally accepted in international humanitarian law and by the human rights community that “when an unlawful act is attributable to the State, international responsibility emerges immediately from this act as a consequence of the violation of international law and, attached to it, the duty to provide reparation and to cease the consequences of such violation”.¹² However, notwithstanding international conventions, a legal right to reparation still depends on the positive law of a particular state, which do not necessarily correspond to general moral rights. The politics of reparation programmes, therefore, is largely a local one. Characteristic of human rights more generally, despite notable international attempts to codify a right to reparation and to move toward an international system of implementing reparation to victims in times of political change¹³, developing and implementing state-sponsored reparation programs is still within the purview of individual states.

As a growing number of reparations programmes are actually being implemented in different cases, the debate can shift from theory to practice, from normative arguments about the right or the need for reparation to an assessment of the conditions under which different reparation schemes have been applied relatively successfully, or not. Approaches to reparation sometimes function as part of a larger strategy of transitional justice, but have also been attempted on an ad hoc basis; in practice, reparation programmes and schemes have been as varied as there are different political, social and cultural contexts. Empirical studies also need to distinguish between the stated objectives of reparation programmes and their actual (perhaps unintended)

¹¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Commission on Human Rights, E/CN.4/Sub.2/1993/8 and a later version E/CN.4/1997/104. This document was commissioned by the UN Sub-Commission on Human Rights to consider the right to restitution, compensation and rehabilitation, and was written by the UN Special Rapporteur against Torture, Professor Theo van Boven (University of Maastricht).

¹² NGO Position Paper on “Reparation for Violations of Human Rights and Humanitarian Law: The Right to Remedy and Reparations under International Law” (March 2003) I.

¹³ The best example of an international system for implementing a reparation program is the UN Compensation Committee, established after the first Gulf War to handle the problem of funding reparation for victims in Kuwait and Iraq. See The United Nations Compensation Commission (1991), found online at <http://www.unog.ch/uncc/>.

consequences. Scholars and practitioners within the field of transitional justice are increasingly concerned with identifying and assessing the actual contribution of particular reparation programmes to achieving justice, promoting reconciliation and facilitating healing. A growing body of relevant data bearing on the success or failure of reparation schemes is slowly developing and will be explored in the next chapter.

Implementing reparation programmes in times of political transition occurs most often within a context of heightened political and social fragility, exacerbated by budgetary constraints and by possible further political conflicts. Experience suggests that developing and implementing reparation schemes at the societal level is greatly affected by the specific social, political and economic context concerned. It is, as Vandeginste writes, extremely difficult to prescribe model solutions, first, “since they do not exist”, and, second, “since their practical implementation would depend on too many intervening factors”.¹⁴ Despite the growing normative consensus, the position at the level of practice and of policy implementation remains problematic. Bridging theory and practice will require careful attention to specific cases. This study seeks to demonstrate the value of comparative empirical analysis as a building block for future studies including more normative approaches.

1.1. Reparation at Issue in Southern Africa

Each of the four countries in the Southern African region examined as case studies in this study have experienced major change in moving from colonial and apartheid rule to independence and democracy: Namibia gained independence from apartheid South Africa in 1989 following a protracted liberation struggle; Zimbabwe became an independent nation in 1980 after a gruelling war of liberation following the earlier UDI of Rhodesia; Malawi gained independence from the British in 1964, but experienced another political transition in the early 1990s with the departure of an authoritarian leader; and South Africa has transformed itself from an apartheid state to a multi-party, multi-cultural democratic state. These four cases are not merely contiguous members of the Southern African region but they share comparable experiences of liberation struggles involving political atrocities but issuing in democratic transition. In different ways each faced issues of reparation for human rights abuses. In each case, political repression by the former regime had resulted in well-documented gross human rights violations by the state; in Namibia, South Africa and Zimbabwe, human rights abuses were committed by agents both of the incumbent regime and of the liberation forces.

Only in the South African case was the issue of reparation addressed in a public way as an integral part of a comprehensive transitional justice process. The TRC was structured in terms of three main Committees

corresponding to the three areas of human rights violations, amnesty and reparation. In South Africa, reparation was part of an ambitious public truth and reconciliation process and thus much more salient and contested. At the other end of the spectrum, Namibia has not introduced any official reparation measures as part of the transitional process. The other three countries have each dealt with the question of reparations in different ways and have developed specific but quite different programmes aimed at victims of human rights abuses. In both Malawi and Zimbabwe the reparation programs were of an ad hoc nature and limited in scope: Malawi set up a National Compensation Tribunal tasked to deliver one-off payments to victims of political oppression during July 1964 – May 1994 while Zimbabwe established a War Victims Compensation Act providing compensation to civilians and soldiers who had suffered damages during the period of 1972-1980.

Despite the TRC's renown, South Africa's transitional process also merits critical examination and further exploration not least because the reparation component turned out to be its least successful and most controversial aspect. Significantly, the TRC had not been mandated to implement reparation itself. The recommendations of the Reparation and Rehabilitation Committee of the TRC provided for a comprehensive array of individual compensation and systematic rehabilitation and redevelopment measures, as laid out in the TRC report submitted in 1998.¹⁵ For a variety of bureaucratic and political reasons, the ANC Government did not respond to the TRC's recommendations on reparation before 2003. During the five years of delays and prevarication, reparation became an increasingly contested issue. These frustrations were further compounded by the minimalist nature of the Government's eventual response. For example, the TRC recommended providing R120,000 as financial compensation to each of the 22,000 individuals deemed victims of human rights abuses, but the government reduced this to a once-off payment of R30,000.¹⁶ Though South Africa explicitly addressed the topic of reparation as part of its post-Apartheid transition, the outcome thus proved less than satisfactory and, indeed, generated considerable controversy and acrimony, as evidenced by numerous protests organized by the Johannesburg-based Khulumani Support Group¹⁷. In different ways, the attempts that have been made to address the topic of reparation in times of political transition in Southern Africa, most notably by Zimbabwe and Malawi, also issued in acrimony and frustration. The specific reasons for this will be investigated in later chapters of this thesis.

¹⁴ S. Vandeginste, "Chapter 9: Reparation" in L. Huyse (ed.), Democracy and Reconciliation in Post-Conflict States: A Handbook (2003) 6.

¹⁵ TRC Report, Volume 5, Chapter 5

¹⁶ For the TRC recommendations, see TRC Report, Vol. 5, Chapter 5, Sections 25 – 32. For the South African government policy, see Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation, on the occasion of the tabling of the Report of the Truth and Reconciliation Commission, Cape Town, 15 April 2003, found online at <http://www.gov.za/speeches/index.html>

¹⁷ See "Khulumani East Rand protest focuses on TRC 'Unfinished Business'", Press Release from Khulumani Support Group (November 21, 2000), found online at <http://www.khulumani.net/content/view/590/163/>.

1.2. Literature Survey

If the question for policy-makers in successor governments has been how to “reckon” with massive state crimes given the political and economic realities, then the question for scholars has rather been what *should* happen and why. By now, there is a substantial collection of literature available on the subject of transitional justice from which to draw inspiration and identify precedents, and some of this will be explored in greater depth in the next chapter. In the literature, scholars have also asked what *has* happened, and why, in order to inform future decision making. Why did one country adopt certain measures, e.g. blanket amnesties, while another country opted for criminal trials, or did nothing at all? The former question, i.e. what *should* happen, constitutes the normative approach, while the latter, what *has* happened and *why*, is answered through empirical study.

One set of benchmarks for any account of reparation as an issue of transitional justice is provided by the various declarations and conventions adopted in the aftermath of World War II. Notable examples of UN Conventions addressing the *right* to reparation include, the Universal Declaration of Human Rights (1948) the European Convention on Human Rights (1950), the Covenant on Civil and Political Rights (1966), the Covenant on Economic, Social and Cultural Rights (1966), and the Inter-American Convention on Human Rights (1969)¹⁸. The canon of literature on reparation as a mechanism of transitional justice also includes what one might consider *technical* reports (i.e. handbooks on implementing reparation programs)¹⁹.

The normative and empirical studies dealing specifically with reparation as an issue in transitional justice are fast growing, yet by no means complete. A significant stride toward a comprehensive global study of the reparation issue was taken at a symposium co-sponsored by the International Development Research Centre (IDRC) and the International Center for Transitional Justice (ICTJ), held in Ottawa, Canada in March 2004 and entitled *Repairing the Past: Reparations and Transitions to Democracy; Reflections from Policy, Practice, and Academia*. Participants discussed findings from a two-year research project on reparations and transitions to democracy that included analyses of Malawi and South Africa²⁰. The IDRC/ICTJ comparative report, billed as the “first comparative global study of reparations programs”, may become the most valuable contribution to the broader debate of the reparation issue vis-à-vis transitional justice. The study was published as a three-volume collection, *Repairing the Past*, edited by Dr. Pablo de Greiff, in Spring 2005.

¹⁸ See “Reparation: A Sourcebook for Victims of Torture and other Violations of Human Rights and International Humanitarian Law” (2003) 9 – 15, found online at <http://www.redress.org/publications/SourceBook.pdf>.

¹⁹ Ibid. See also, for example, “Expert Seminars on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions” (March and September 2002), a chapter on “Reparation” in *Democracy and Reconciliation in Post-Conflict States: A Handbook* (2003), Conference Report on Trauma and Transitional Justice in Divided Societies, (March 27-29, 2004), sponsored by the US Institute of Peace and the American Association for the Advancement of Science, P. De Greiff, , *Handbook of Reparations* (ICTJ, 2006).

²⁰ Symposium summary found online at www.ictj.org (May 2005).

More recently, the International Centre for Transitional Justice has completed a three volume book entitled, *The Handbook on Reparations*, comprising twenty-seven authors from fourteen different countries, in which over twelve cases are studied in depth.²¹ The book provides “empirical grounding” for further inquiry of the subject²²; it is “intended to provide a broad range of essential information about past experiences with massive reparation programmes as well as normative guidance for future practice”²³. Two additional important contributions to the field that were published recently include John Torpey’s *Making Whole What Has Been Smashed* (2006)²⁴, a book on reparations politics, and de Feyter’s *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (2006)²⁵, a collection of papers presented at an International Conference on Reparations, held in Feb 2005, in Brussels.

A number of developments happened on the African continent in the 1990s that indicate a newfound concern on the continent for addressing justice after long periods of violence and repression involving gross human rights abuses. However, as Parlevliet²⁶ contends, it was only with the establishment of the TRC in South Africa that attention by scholars in the field of transitional justice turned to Africa. Other aspects of the South African TRC process have received copious attention. More specialised and in-depth studies of the reparation process in particular are, by comparison, few and far between. The issue of reparation tend to be discussed and examined alongside and as a counter-balance to amnesty and truth-telling, and as a contributor to reconciliation, peace and justice²⁷. The author drew on two in-depth cases in particular. Christopher Colvin wrote an unpublished case study commissioned by the International Centre on Transitional Justice that was made available through the Centre for the Study of Violence and Reconciliation (CSVR). Colvin focused mainly on the process and deliberations of the TRC’s Reparation and Rehabilitations (R&R) Committee, as well as on the role of victims in that process. Colvin also developed a listing of key resources for reparation in Southern Africa²⁸. Hamber and Mofokeng published a more comprehensive analysis of the R&R deliberations within the TRC, though without as many interviews with victims²⁹.

²¹ The twelve cases analyzed are Chile, Argentina, Brazil, El Salvador, Haiti, South Africa, Malawi, USA, Jewish victimization during the Holocaust, UN Compensation Commission, 9/11 Fund and German Force Labor and Slave Labor.

²² *Handbook on Reparation* (2006) 3

²³ *Ibid.* 1.

²⁴ Torpey, J., 2006, *Making Whole What Has Been Smashed: On Reparations Politics*, Cambridge: Harvard University Press

²⁵ de Feyter, K., 2006, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Institute for Human Rights and the Institute for Law and Society, University of Antwerp and Leuven.

²⁶ M. Parlevliet, “Truth Commission in Africa: the Non-Case of Namibia and the Emerging Case of Sierra Leone” (2000) 99.

²⁷ See, for example, B. Hamber & T. Mofokeng, “From Rhetoric to Responsibility” (2000).

²⁸ C. Colvin, *Key Resources on Reparations in Southern Africa* (2004) found online at <http://www.csvr.org.za/papers/papsarp7.htm#legislation>.

²⁹ B. Hamber & Mofokeng, “From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa” (2000).

The impetus for this particular project comes from an initiative of the CSVr, a research organization that studies and advocates for the rights of victims in political transition and post-conflict. CSVr compiled an abundance of research on the reparation issue intended for use as part of the Southern African Research Project (SARP), which was funded by the International Development Research Centre (Canada). The SARP brings together civil society organizations (mainly in the human rights community) from five Southern African countries – South Africa, Zimbabwe, Malawi, Mozambique and Namibia – on a five-tiered project covering the following areas vital in the process of a victim-centred reconciliation in times of transition: memorialisation, reparation, victim support services, counseling, and reintegration of ex-combatants/returnees. It was a collaborative project involving CSVr (South Africa), the Centre for Human Rights and Rehabilitation (Malawi), the National Society for Human Rights (Namibia), Amani Trust (Zimbabwe) and Justa Paz (Mozambique)³⁰. CSVr provided the author with “country reports” that addressed decisions in time of transition and featured interviews with victims and other stakeholders³¹. One limitation of this case study analysis is that while the information gathered for this study is sufficient for the purposes of the study, it by no means offers a complete picture of research, policy documents and victim/perpetrator sentiment regarding reparations. Although the research conducted for South Africa was substantial, what was available for Zimbabwe and Malawi was significantly less.

In the case of Malawi, Diane Cammack’s, “Reparations in Malawi”, 1992 – 2001, commissioned by the International Centre for Transitional Justice (ICTJ), is the most comprehensive. Cammack’s work is now integrated into a larger comparative analyses by the ICTJ of the reparation issue³². In the case of Namibia, the author relied on an eclectic range of writings including an Africa Watch report, “Accountability in Namibia”³³, Keulder’s *State, Society and Democracy: A Reader in Namibian Politics*³⁴ and Parlevliet’s “Truth Commission in Africa: the Non-Case of Namibia and the Emerging Case of Sierra Leone”³⁵ (1998).

Zimbabwe’s transition from colonialism has received, and still receives, a great deal of attention. REDRESS annually publishes its *Audit Study, a Detailed Analysis of the Law and Practice on Reparation for Torture in 30 Countries*, arguably the most detailed empirical study to date of reparation to survivors of torture. Zimbabwe and South Africa are among the list of countries covered. While much of the research focuses on the land restitution issue, there are important studies chronicling and analysing the development of the War

³⁰ This research project is found online at www.csvr.org.za/res/pubssarp.htm.

³¹ O. Malakamela, “Southern African Research Project Country Report on South Africa” (2003). See also “Country Report on Malawi”, *The Economist Intelligence Unit* (2002) 7, “Southern African Research Project Country Report on Namibia”, (2003), “Southern African Research Project Country Report on Zimbabwe: Overview of Human Rights Situation” (2002), and A. Zunguza, “Southern African Research Project Country Report on Mozambique” (2003).

³² P. De Greiff (ed), *The Handbook on Reparation* (2006).

³³ R. Dicker, “*Accountability in Namibia: An Africa Watch Report*” (Human Rights Watch, 1992)

³⁴ Keulder (ed.), *State, Society and Democracy: A Reader in Namibian Politics*, (2000)

Victims Compensation Act, as well as the more recent campaign to provide reparation for victims of the Matabeleland and Midlands disturbances and other alleged government aggressions against its own people. Among the most comprehensive are work by the Catholic Commission for Justice and Peace in Zimbabwe³⁶, and Anthony Reeler's commentary in Legal Forum³⁷.

This study seeks to add value to the present literature as among the first comparative studies of reparation in the context of transitional justice in Southern Africa. It is unique as an attempt to draw comparisons and contrasts between South Africa and three of its neighbours with respect to "reparation". A greater understanding of the factors that contribute to the development or non-development of reparation programs, as well as of the implications of reparation programmes as a mechanism for transitional justice, may also strengthen the task of human rights organisations in lobbying on behalf of victims, and of their government counterparts who are pressured to provide for victims of past human rights abuses. Most importantly, a better grounded understanding of reparation measures, based on a comparison of actual cases, will hopefully contribute positively to the future development of fair and comprehensive reparation programmes at the state or even community level.

1.3. Research design and methodology

That reparation has been on the agenda in all four countries in this region (South Africa, Zimbabwe, Namibia, and Malawi), but in different ways, provides the specific research focus for the present study. The South African case is much better known and publicized than the other three. It is also the only one which was part of an official and holistic truth and reconciliation process. Implicitly and explicitly, the other cases of reparation measures, which were *not* part of an official and holistic truth and reconciliation process, invite comparison with the South African case. If the reparation programmes differ, then this can presumably be traced to the differences in underlying conditions and to the varying factors contributing to the development of these programmes. Similarly, if approaches to reparation function as part of a larger strategy of transitional justice in one setting (South Africa), but have been attempted on an ad hoc basis in other settings (Malawi and Zimbabwe), then what are the comparative and contrasting political and socio-economic consequences of these various approaches to reparation?

³⁵ M. Parlevliet, "Truth Commission in Africa: the Non-Case of Namibia and the Emerging Case of Sierra Leone", (2000) pp. 98 – 111.

³⁶ "Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and Midlands, 1980 – 1988: Summary Report", (Catholic Commission for Justice and Peace in Zimbabwe and The Legal Resources Foundation, April 1999).

³⁷ A. Reeler, "Compensation for Gross Human Rights Violations: Torture and the War Victims Compensation Act", (Legal Forum Vol. 10, No. 2, 1998)

The exercise of locating particular approaches to reparation within the wider transitional *political, social and economic* context is inspired by Luc Huyse's insight (among others) that "the place reparations receives on the agenda of a given transitional society depends on the particular conjunction of political, cultural and historic forces"³⁸. Barahona de Brito also postulates that the "key obstacle about this topic is the enormous influence of the particular historical evolution of each country, and various factors emerging there from ... thus, there is a variability of cases and contexts that is truly wide-ranging and difficult to catalogue or categorize"³⁹. For Huyse, the essential question is, "How to identify the enabling and constraining factors that will determine the position of reparation on the transition agenda"⁴⁰. Recognizing that reparations for gross violations of human rights is a moral imperative, but that decisions made in times of transition are inevitably political and thus determined by the prevailing power relations, authors such as Zalaquett⁴¹ remark on the difficult yet inescapable task of reconciling ethical requirements and political constraints. For the purpose of locating the experiences of the four countries within the context of reparation as an issue of transitional justice, relevant theories on reparation will be explored prior to an examination of the four cases. Past research and current theory guide the research methodology for each case.

Determining the relevant socio-political-economic factors that contributed to the development (or non-development) of reparation programs in times of political transition in four cases in southern Africa will be one key focus of the case studies. The substance and scope of the policies for reparation programmes, their implementation and the effect of the programmes will be another important focus. Accordingly, the case studies conducted in Chapter 3 will investigate such questions as the following:

- What is the historical background of gross human rights violations and claims for reparations?
- What is the transitional context and what transitional justice mechanisms (i.e. Reparation and Amnesty, Reconciliation, Truth-telling) were utilized (or not utilized) in that context?
- What were the objectives and means, process and outcomes, reception and assessment of the programmes of reparation that were developed?
- In the case where no reparation programme was developed, what was the identified rationale for the non-development of reparation programmes?

In considering these questions the study will largely be limited to considering non-judicial State-sponsored reparation programmes. "Symbolic reparations" and "collective measures" will also be examined (but in less detail). The study will not specifically consider the issue of an official apology as a form of reparation, but makes mention of it only where victims or other stakeholders insist that an apology is tantamount to, or part

³⁸ L. Huyse, "Reparation as a Dimension of Transitional Justice", 54.

³⁹ A. Barahona de Brito a.o. (eds), "Conclusion", in *The Politics of Memory: Transitional Justice in Democratizing Societies* (2001) 303.

⁴⁰ Ibid.

⁴¹ J. Zalaquett, "Keynote Address", in A. Boraine, J. Levy, and R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa* (1994) 9.

of, reparation, and, therefore, an important working outcome. The study does not go into detail on the issue of land restitution due to the complexity surrounding the issue and the immense volume of literature on the subject. Reference is made to the issue where applicable; the author, however, acknowledges that this study inadequately explores land restitution as a facet of transitional justice and its connection to the reparation question.

This study is thus an investigation of a limited set of cases for purposes of theory development, to set the stage for subsequent testing and/or policy evaluation. As an exploratory, limited comparative survey, the study does not in the main take the form of primary research, whether based on fieldwork, surveys or original interviews. Instead, it is largely based on a survey of available secondary sources and public documents, supplemented by interviews with practitioners and victims. The relevant data base for each case comprises policy documents; “country reports” compiled by local researchers affiliated with the Centre for the Study of Violence and Reconciliation (CSVSR); interviews with government officials, victims and other stakeholders from each country; relevant newspaper articles; and scholarly papers by human rights experts and academics. Interviews conducted by CSVSR in each country used a common interview format in order to ensure that comparable information was collected. The consequence of collaborating with CSVSR is that the case studies draw heavily on civil society documents and victim statements. This was suitable, indeed preferable, for the purposes of the CSVSR/SARP report from which this study took root. The period of time of research for each case study extends through to the end of 2003.

Another limitation relates to the question of timing. In some cases, notably South Africa, broad-scale reparation programmes were only in the stages of infancy during the period covered in this study (up to 2003). A government policy on final reparation grants was announced in February 2003, and it will be years before the consequences of that programme are evident. Moreover, the research for this particular analysis was conducted in 2002 – 2003, while the author had limited contact with the subject in Southern Africa after 2004. Therefore, the timing of this study makes it difficult to draw firm conclusions with respect to the consequences of reparations programmes (or non-adoption of such programmes) that are at such an early stage of development and implementation.

Considering that exploration of this reparation issue, in general, and more specifically in southern Africa, ventures into relatively uncharted waters, the present study will be limited to uncovering relevant experiences, recording key observations, conducting broad analyses, and thus making an initial effort to provide a platform for future, more comprehensive social science research. For purposes of comparative analysis other variables derived from the literature on transitional justice and reparation programmes, including the vitality of the legal environment, the strength of the economy, the perceived consequences of

the reparation programmes, the nature of the response or engagement of civil society as well as the needs and wants of victims may also be considered.

It is important to highlight, and draw on, some of the general theories on transitional justice, as well as the more important conceptualisations of reparation and restitution within transitional justice. In the next chapter, I will highlight seminal authors in this field who offer general theories on decisions made in times of political transitions, including Huntington (1991)⁴², who proposes that the balance of power is the prime factor in determining decisions vis-à-vis transitional justice, as well as Elster (1998 and 2004)⁴³, Huysse and Pion Berlin (1994)⁴⁴, who propose that beliefs, values and the workings of individual stakeholders and the constraints on their decisions are prime factors. With specific reference to the development of reparation policies, the author finds Barkan's normative framework that "restitution proposes a process, a negotiated justice" - where the legitimacy and recognition of all stakeholders in a post-conflict situation is desired not as a means but as an end in itself - compelling as a contemporary framework of reparation policy development.⁴⁵ Recognition as reparation (and vice versa) is the focus of Barkan's theory. Barkan writes, "Since the desire for recognition is insatiable, restitution is a process, an ideology, but not a home"⁴⁶. The process of restitution leads to recognition of a previously disenfranchised group by legitimizing the group's claims. The author also finds de Greiff's "taxonomy" of reparation efforts particularly helpful in understanding the pressing challenges posed when reparation programmes are implemented⁴⁷.

Following the theoretical analysis presented in Chapter 2, I will address in Chapter 3 the four cases in detail using the abovementioned research design. Chapter 4 concludes the study with a summary of findings with limited recommendations for consideration by policy-makers and academics who confront the challenges and opportunities of reparation policy.

⁴² S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991) 124 – 125, 142, 151, 211 – 231.

⁴³ J. Elster, "Coming to Terms with the Past: A framework for the study of justice in the transition to democracy", *Archives Européenne Sociologique* (1998) 7 – 48. See also J. Elster, *Closing the Books: Transitional Justice in Historical Perspectives* (2004) 81.

⁴⁴ D. Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone", in *Human Rights Quarterly* (1994) 105 – 130.

⁴⁵ E. Barkan, ix – xli, 308 – 346.

⁴⁶ *Ibid.*, 320.

⁴⁷ P. De Greiff, "Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations" in *Handbook of Reparations* (2006) 5.

2. Reparation as a Problem of Transitional Justice

This chapter sets out to provide an introductory discussion of the conceptualisation of reparation, followed by a brief outline of the main different approaches to reparation, as well as a brief consideration of a possible theoretical framework for reparation as negotiated justice. First, though, a more specific definition of the meaning of “reparation” and a background account of the history of different reparation schemes as mechanisms of transitional justice is necessary in order to clarify both the focus and scope of analysis that will occur in each case study.

2.1 Conceptualising Reparation: A Comprehensive Approach

The inclusive conception of reparation as defined by Hayner and described above corresponds to what is outlined in most of the UN documents, namely the Draft Articles on State Responsibility of the International Law Commission of the United Nations¹ and the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law². Scholars and practitioners rightly warn against the common practice of treating “reparation” as synonymous with “compensation”. Reparation can take multiple forms; compensation is only one form of reparation. Unlike compensation, reparation is usually not merely a financial issue³. As one form of reparation, compensation can be divided into four parts, according to Stef Vandeginste in an IDEA “handbook” on reparation⁴. Compensation includes:

Nominal damages, “a small amount of money symbolising the vindication of rights”; *pecuniary damages*, “intended to represent the closest possible financial equivalent of the loss or harm suffered”; *moral damages*, “relating to immaterial harm, such as fear, humiliation, mental distress, harm to reputation or dignity”; and *punitive damages*, aimed at punishing or deterring rather than making up for loss suffered.

Nor should “reparation” be conflated with “reconstruction” or “reconciliation” though it may be a mechanism utilised in such broader social and political processes and may be a significant force in the achievement of final reconstruction and reconciliation goals. A comprehensive reparation programme may include restitution and compensation, but it will not undo the damages caused by human rights abuses or

¹ “Draft Articles on State Responsibility”, adopted by the ILC drafting Committee, presented to the 2000 session of the ILC, annexed to UN Doc A/55/10.

² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Commission on Human Rights, E/CN.4/Sub.2/1993/8 and a later version E/CN.4/1997/104.

³ See, for example, B. Hamber and K. Rasmussen, “Financing a Reparations Scheme for Victims of Political Violence” in B. Hamber and T. Mofokeng, From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence, (October 2000).

⁴ S. Vandeginste, “Reparation”, in L. Huyse (ed.), Democracy and Reconciliation in Post-conflict states: A Handbook (2003) 145 - 162.

bring back loved ones. Suffering continues well after reparation has been implemented. To further break down the components of reparation in Hayner's definition above, according to Vandeginste "rehabilitation" measures aim at restoring a victim's physical and psychological health, while "satisfaction" applies to "types of redress that do not aim at repairing specific individual losses or harm"⁵. Satisfaction includes at least four types: disclosure of truth; apology and acceptance of responsibility; judicial or administrative sanctions against individual perpetrators; and commemorations and tributes to the victims.

In the case studies that follow, the holistic definition of "reparation" will be utilized. The various components – compensation, rehabilitation, etc. – will be addressed (if applicable to the cases) but only where germane to transitional justice. For example, when compensation for victims occurs or is pursued in times of transition but not in the context of transitional justice, this will not be considered as reparation. An example of this may be civil cases that do not pertain to gross human right violations or attempt to secure retribution from human rights perpetrators.

2.2 Reparation and Transitional Justice

The academic interest in *transitional justice*, writes Hayner, "developed in response to the demands and differing circumstances of many transitional states around the world, and the increased public and international expectation that accountability is due after atrocity"⁶. *Transitional justice* may be defined broadly, in Rosenberg's words, "as how to deal with the past and how to remake a damaged political and social culture through utilizing judicial and quasi-judicial methods"⁷. More specifically it is concerned with transitional contexts in which politically motivated human rights abuses have occurred. What began with moral-legal dilemmas of retributive justice following World War II, e.g., critiques of 'victor's justice' of the Nuremberg International Military Tribunal, has now expanded into an academic sub-field of its own, albeit a multi-faceted (and interdisciplinary) one that draws on political science, international law, philosophy, legal ethics, economics and sociology among others. The increased interest in transitional justice as a field of academic and political inquiry is closely related to "transitology", the aptly labeled study of regime transitions spawned by the notable increase in political transitions from authoritarian rule to new democracies since the 1970's.⁸ Nearly every region across the globe, though especially Latin America, Eastern and Southern Europe, Southeast Asia and Africa, has experienced or continues to experience such

⁵ Ibid. 146.

⁶ P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocities* (2001) 11.

⁷ T. Rosenberg, "Afterword: Confronting the Painful Past", in M. Meredith, *Coming to Terms: South Africa's Search for Truth* (1999) 327.

⁸ J. Elster, "Coming to Terms with the Past: A framework for the study of justice in the transition to democracy", *Archives Européenne Sociologique* (1998) 48. See also G. O'Donnell, L. Whitehead & P. Schmitter (eds), *Transitions from Authoritarian Rule: Comparative Perspectives* (1986), and S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991)

democratic transitions from authoritarian rule. Many of these societies have been confronted with similar issues of transitional justice: how should they deal with the legacies of political atrocities and human rights abuses committed by the prior regime and its adversaries in the course of a political transition?

The decisions made regarding justice following such democratic transitions vary widely⁹. Adam, for one, distinguishes six main options open to successor regimes: Amnesia, Trials and Criminal Prosecution, Lustration (or disqualification of collaborators from public office), Negotiated Restitution, Political Re-education and Truth Commissions¹⁰. While Spain opted to do very little in the way of bringing justice to members of Franco's brutal regime, implicitly opting for amnesia¹¹, Portugal instituted widespread lustration, particularly of the military and security forces, although it failed to secure many prosecutions¹². Chile and Argentina established truth commissions, while Bolivia, Uruguay and Paraguay set up parliamentary commissions to work in conjunction with local non-governmental organizations¹³.

While early attention focused on democratic transitions in Latin America and Southern and Eastern Europe, more recent attention has shifted to transitional justice measures linked to democratic transitions in East Asia and Africa. East Timor, for example, has established a Commission for Reception, Truth and Reconciliation¹⁴. In Africa, countries like Nigeria and Ghana¹⁵ have recently established commissions aimed at investigating human rights violations, mirroring South Africa's much heralded Truth and Reconciliation Commission. Sierra Leone initiated a Truth and Reconciliation Commission and with help from the United Nations has also undertaken a "Special Court" to prosecute those persons who bear the greatest responsibility for violating international humanitarian law¹⁶. An International Criminal Tribunal for Rwanda¹⁷ set up by the United Nations in a comparable mold of the UN International Tribunal for the former Yugoslavia in the Hague, is in operation in Arusha, Tanzania to prosecute selected high profile cases of those suspected of participating in the 1994 genocide.

⁹ N. Kritz (ed.), Transitional Justice: How Emerging Democracies Reckon with Former Regimes, 3 vols (1995); M. Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence (1998) and J. Elster, Closing the Books: Transitional Justice in Historical Perspectives (2004).

¹⁰ H. Adams, "Divided Memories: Confronting the Crimes of Previous Regimes" in *Telos* (1999) 89.

¹¹ Ibid. 94. See also A. Rigby, Justice and Reconciliation: After the Violence (2001) pp. 39 – 62.

¹² N. Kritz, Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume II, Chapter 8 (1995), 283 – 297.

¹³ P. Hayner, "Fifteen Truth Commissions - 1974-1994: A Comparative Study", *Human Rights Quarterly* (1994) 597-655.

¹⁴ For background and a final report, see the website for the East Timor Commission for Reception, Truth and Reconciliation at <http://www.easttimor-reconciliation.org/>

¹⁵ "National Reconciliation in Ghana: Prospects and Challenges", Briefing Paper by E. Gyimah Boadi (2001).

¹⁶ For background and up-to-date proceedings, see the Official Website for The Special Court of Sierra Leone, <http://www.sc-sl.org/>.

2.3 Different approaches to reparation as an issue of transitional justice

The differences and variations in the approaches adopted to shared problems of transitional justice require general analysis and explanation prior to analyzing the four cases in Southern Africa. Huntington (1991)¹⁸, who analyzed the retroactive justice decisions (i.e., to prosecute or not) in thirty-five “third-wave” transitions during the 1970’s and 80’s, found that “in actual practice what happened was little affected by moral and legal considerations. It was shaped almost exclusively by politics, by the nature of the democratization process and by the distribution of political power during and after the transition.”¹⁹ For Huntington, among others²⁰, the *key* variable was the relative strength of emergent pro-reform groups vis-à-vis elites inherited from the former authoritarian regime. The particular option adopted in a transitional context depends on this power balance as well as on the type of transition. Huntington identified three types of transitions: *transplacements* (or negotiated settlements), where negotiations between the incumbent regime and the opposition result in a new political dispensation based on elite pacts; *transformations*, which occur when the authoritarian government is stronger than the opposition and initiates the controlled change from the old regime into a democratic system through top-down liberalizing reforms; and *replacements*, which occur when a weak(ened) regime is overthrown by a stronger opposition or through external interventions. The type of regime change determines the decisions made vis-à-vis the transitional justice process. More specifically, *replacements* allow criminal prosecution of agents of the prior regime, whereas *transformations* and *transplacements* typically involve general amnesties and amnesia²¹. For the purposes of this study, the critical question will be what the implications are for the likelihood and nature of reparation programmes as a possible response to past atrocities. Can it be shown that different kinds of reparation programmes tend to be adopted depending on the type of transition involved or that reparation programmes are more feasible in the case of negotiated settlements and revolutionary transplacements than in the case of controlled transformations?

Elster (1998 and 2004)²² and Pion-Berlin (1994)²³ differ from Huntington in so far as they argue that behavioral variables and other constraining and enabling factors specific to each country contribute to the decisions taken by successor governments. In his 1998 study, Elster highlights five types of decisions (as

¹⁷ For an in-depth look, see International Criminal Court for Rwanda, www.ictj.org.

¹⁸ S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991).

¹⁹ *Ibid.* 69.

²⁰ See, e.g., A. Barahona de Brita (eds), “Introduction” in *The Politics of Memory: Transitional Justice in Democratizing Societies* (2001).

²¹ S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991) found in N. Kritz, *Transitional Justice*, Vol 1 (1995), p. 66.

²² J. Elster, “Coming to Terms with the Past: A framework for the study of justice in the transition to democracy”, *Archives Européennes Sociologiques* (1998) 7 – 48. See also J. Elster, *Closing the Books: Transitional Justice in Historical Perspectives* (2004).

dependent variables) that confront successor governments: 1) identifying wrongdoers; 2) deciding how to deal with wrongdoers; 3) identifying victims; 4) determining how to deal with victims; and 5) making a number of procedural decisions with respect to the four above²⁴. It should be evident that of these 3) and 4) and 5) specifically involve approaches to reparation. His list of independent variables include: the behavior and attitudes of political actors; constraints on their decisions (i.e., scarcity of time, attention, funds, personnel, etc.); their motivations, comprising of “reason, interest and passion” (i.e., rights versus needs of victims, forward-looking principles of reconstruction versus backward-looking principles of entitlement, etc.); and their beliefs -- both factual (i.e. number of victims) and causal beliefs about likely effects²⁵. Elster concentrates on the effects of personal attitudes and behaviors on decision making in times of transition, what might be described as the social-psychological analysis of decision making at the individual level.

Elster points to two basic dimensions of approaches to justice in times of political transition; policy decisions are basically concerned, on the one hand, with what to do with perpetrators, collaborators and bystanders and, on the other hand, with how to help victims. “Successor governments,” he asserts, “have to decide whether leaders of, collaborators with or agents of the former regime should be brought to court or otherwise penalized and whether and how the victims of the regimes should be rehabilitated and compensated”²⁶. Ensuring accountability for the perpetrators and acknowledgment of the victims of human rights abuses are the two basic aims of the process; dealing with perpetrators, collaborators or agents of the old regime plus the victims of their atrocities are necessary for meeting those aims. His 2004 study takes a hard-edged empirical look at what happened in numerous cases and why certain individuals acted certain ways. In the words of Henry Clor, Elster explores “the motivations of legal decision-makers under three broad categories: ‘reason, interest and emotion’. Those meting out the punishments and restitutions might be motivated by their economic, political, or career interests; or they might be activated by a passion for revenge, and the passion for revenge can be driven by anger or by hatred.”²⁷ Whether the development of reparation programs at the state level is susceptible to the emotions and interests of policy-makers, especially if those policy-makers have or have had some political, economic or emotional stake in the outcome, will be considered in the forthcoming case studies.

In examining why human rights trials against military offenders were held in Argentina and not elsewhere in the Southern Cone, Pion-Berlin²⁸ enumerates six possible causes or independent variables: 1) the nature,

²³ D. Pion-Berlin, “To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone”, in *Human Rights Quarterly* (1994) 105 – 130.

²⁴ J. Elster, “Coming to Terms with the Past” (1998) 17.

²⁵ Ibid. 27.

²⁶ J. Elster, “Coming to Terms with the Past” (1998) 48.

²⁷ H. Clor, “Book Review: *Closing the Books: Transitional Justice in Historical Perspectives*, *The Review of Metaphysics*, (September 1, 2005) 171.

²⁸ D. Pion-Berlin, “To Prosecute or to Pardon?” (1994) 82.

scope and intensity of repression; 2) the balance of power emerging between the armed forces and civilian government; 3) preferences of the elite; 4) pressure from organized interest groups; 5) strategic calculations of costs and benefits; and, 5) the “contagion effect”²⁹. He concludes that the weakest independent variables were the human rights lobbies (i.e., mass pressure) and the “contagion effect”, whereas the strongest independent variable was the strategic calculations made by political leaders. His conclusion can be summarized with respect to the following considerations: first, “how political leaders assess the *political costs, benefits, and risks* involved in a decision invariably influence their choice of policy instruments”³⁰; and second, “commitments to one position or another were lodged in *political understandings* as well as principles”³¹. His findings offer guidance to the forthcoming analysis of the Southern African case studies, as his conclusions apply also to the experiences with reparation.

2.3.1 Judicial and Non-judicial Approaches to Reparation

A critical distinction can be made between judicial and non-judicial approaches to reparation. In the judicial approach, individual and collective claims to reparation are settled through judicial means in terms of basic rights and the determinations of legal statutes or common law (i.e. domestic tort law or international customary law). Within this judicial approach, reparation usually takes the form of restitution or compensation for damages. As against this, in a non-judicial or a socio-political approach reparation programmes emerge from political decisions or compromises by successor governments. It is generally accepted, as Vandeginste writes, that in times of political transition “reparation cannot be provided effectively to a large number of victims through an exclusively judicial approach”.³² The judicial approach may be beneficial in class action cases that result in judgments or settlements for large number of cases but, as Rombouts outlines, there are sound reasons why “the legal apparatus is not fit to answer the reparation quest” for victims in the context of a political transition. She explains these five reasons: 1) domestic law is often inadequate to provide reparation; 2) juridical procedural technicalities, long procedures, and a high burden of proof tend to obstruct effective reparation schemes; 3) the judicial system may be unable to handle high volumes of cases; 4) criminal justice prosecutions marginalises victims in its focus on the accused, whereas a socio-political approach has the capability to be more inclusive; 5) enforceability – she claims policies arising out of negotiated settlements have a high chance of being implemented³³.

²⁹ Ibid. 84.

³⁰ Ibid. 93 (my emphasis).

³¹ Ibid. 101 (my emphasis).

³² S. Vandeginste, “Reparation”, Chapter 9 in D. Bloomfield, T. Barnes and L. Huyse (eds.), Reconciliation After Violent Conflict: A Handbook (2003), 151.

³³ H. Rombouts, Report on Expert Seminar (2002) 44 – 46..

However, it is important to keep in mind that the distinction between judicial and non-judicial approaches to reparation does not necessarily pose exclusive alternatives. The experience of Argentina (and Malawi, below) reveals that the purely legal approach and the socio-political approach can be combined and interrelated. On the one hand, judicial claims to reparation may occasion a more-speedy or more comprehensive socio-political response. Thus, the Argentine Congress passed the reparation laws in 1994 “in the face of national court decisions awarding sums of \$250,000 to \$3 million in “moral damages” to families of the disappeared”³⁴. On the other hand, a socio-political approach to reparation may infringe on the victims’ constitutional rights to civil claims. In the South African case, for example, victims and victim support groups challenged the Truth and Reconciliation Commission before the South African Constitutional Court on the grounds that the TRC’s provisions for amnesty violated the rights of victims to civil claims against perpetrators for reparation³⁵. The Court recognized the grounds for this claim, but held that the TRC’s objective of reparation to victims could replace their civil right to compensation. The case served to establish reparation as a central objective of the TRC and provided a rallying cry among victims, first when the South African government delayed its determination of final reparations and then when it announced a reparation scheme that was significantly weaker than what the TRC recommended.

In many situations, the courts may still be logical starting points for pursuing reparation claims in traditional, long-standing democracies. Non-judicial or political “reparation schemes are favoured when there is difficulty in pursuing civil suits to recover damages”, according to Edelstein.³⁶ This may arise in cases where victims are so numerous that individual claims are impractical or where the legal system is tainted by government interference. Vandeginste also identifies a litany of “pitfalls” and “risks” in the judicial system versus the non-judicial approach, concluding, “the justice system itself may emerge as a ‘victim’ from the past era of oppression”³⁷. One of the dilemmas in developing and implementing a reparations scheme outside the legal realm concerns prescribing benefits for certain classes of victims while balancing individual rights for all victims. In the transitional context, it is advantageous – even required, argues De Greiff - that there is a close relationship between reparation programs and the criminal justice system. This is essential to maintain what he calls the pragmatic and conceptual requirement of “external coherence” or credibility. He writes, “Beyond the pragmatic advantage, it may be argued that the requirement flows from the relations of complementarity between the different transitional justice mechanisms”³⁸. There is, in other words, a

³⁴ P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocities* (2001) 176.

³⁵ South African Constitutional Court Judgment of 25 July 1996 involving AZAPO et al, found on the Web at www.doj.gov.za/trc/legal/azaposum.

³⁶ J. Edelstein, “Rights, Reparations and Reconciliation: Some Comparative Notes”, paper presented to Centre for the Study of Violence and Reconciliation (July 27, 1994) 2.

³⁷ S. Vandeginste, “Reparation”, Chapter 9 in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook* (2003), 157.

³⁸ P. De Greiff, “Introduction” in *Handbook on Reparations* (ICTJ) (2006) 11.

“bidirectional relationship” between reparation and criminal justice, just as there is between reparation and other mechanisms of transitional justice, e.g., truth-telling. He writes:

In this sense from the standpoint of victims, especially once a possible moment of satisfaction derived from 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.³⁹

2.3.1.1 Legal approaches to reparation

The contemporary discourse on reparations in transitional justice builds on earlier practices and traditions; the idea and practice of “repairing” harms by providing for the victim after a crime is not new. In fact, reparation as a concept and practice is firmly rooted in the legal realm, and more specifically in tort law, which involves cases where damages are sought for wrongdoing. An individual’s legal right to reparation actually finds its origins in ancient law. The Babylonian Code of Hammurabi, dating back four thousand years, is cited as among the first statutes establishing this right: “... the city and sheriff in whose land and boundary the theft has taken place shall restore to him all that he has lost”⁴⁰. Though this may suggest the State’s responsibility for providing compensation, scholars contend that the primary focus of ancient law was on restitution “from the criminal to the victim, not on compensation from the state to the victim”.⁴¹ Ancient law finds credence in contemporary criminal law. Edelstein informs us that reparation in the victim/offender sense,

often signif[ies] the process of making amends by an offender to his victim, or to victims of crimes generally ... this may take the form of financial compensation, the performance of community services or the return of stolen property. The term has also been used to describe situations where criminal offenders apologize to their victims and provide reassurances that an offence will not be repeated⁴².

The legacy of Nuremberg – where the victorious Allied powers, led by the U.S., U.K., France and Soviet Union, established the International Military Tribunal (IMT), situated in Nuremberg, Germany, to prosecute the war crimes and crimes against humanity of the defeated Nazi regime – shapes today’s discourse and analysis in transitional justice by firmly establishing “crimes against humanity” in customary international law. The very notion of “crimes against humanity” was, in fact, an innovation of the IMT at Nuremberg.

³⁹ Ibid. Parenthetically, De Greiff adds, “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 relations between criminal justice and truth telling, and between each of these and institutional reform.”

⁴⁰ C. Edwards, *The Hammurabi Code* (1904) 31, cited in R. Meiners, *Victim Compensation: Economic, Political and Legal Aspects* (1978) 7.

⁴¹ Ibid.

⁴² J. Edelstein, “Rights, Reparations and Reconciliation” (1994) 2.

This provided impetus to a fledgling global human rights movement and set a precedent for the prosecution, both at the international and national level, of state-sponsored violations of human rights. The numerous international conventions and covenants⁴³ that followed WWII utilized the definition of “crimes against humanity”⁴⁴ in establishing the principles of universally accepted human rights, such as rights to life, freedom from torture, etc. Despite the many and important conventions adopted, little progress was made at the level of implementation and practice after WWII until the 1990’s⁴⁵.

Though its main focus is on criminal prosecution of perpetrators, the recently ratified International Criminal Court (ICC) may offer some promise to victims whose countries refuse to provide reparation in post-conflict situations. In the first instance, the ICC aims to prosecute individuals alleged to have committed “the most serious crimes of concern to the international community as a whole” and “unimaginable atrocities that deeply shock the conscience of humanity”.⁴⁶ These include “genocide”, “war crimes”, and “crimes against humanity”. However, a provision in the ICC (Article 75) also mandates the Court to establish principles concerning reparation to victims, including restitution, compensation and rehabilitation. In addition, a UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities established three principles in relation to the question of overcoming impunity of perpetrators: (a) the victims’ right to know; (b) the victims’ right to justice; and (c) the victims’ right to reparations.⁴⁷

2.3.1.1.1 A Right to Reparation?

What has emerged since World War I is the growing recognition of a *right* to state-sponsored reparation programs administered in conjunction with, or independent of, the court system and in response to politically motivated crimes (e.g., “crimes against humanity”). A *right* to reparation is certainly on the agenda of international humanitarian law and it is generally acknowledged, as Barkan writes, that “public awareness of crimes against humanity committed by governments, their effects, and what is done to mitigate those effects is increasingly translated into political force”⁴⁸. Complementing the legal and normative *right* is a shared

⁴³ Examples of these international instruments of human rights are the UN Covenant on Civil and Political Rights (1966), the European Convention on Human Rights (1950), the Inter-American Convention on Human Rights (1969), and the Universal Declaration of Human Rights (1948).

⁴⁴ One definition of crimes against humanity can be found in Allied Control Council Law no. 10 of December 1945; J. Herz, “An Historical Perspective”, in *State Crimes: Punishment or Pardon* (1989) 13. It reads, “Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated”.

⁴⁵ G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (1999)

⁴⁶ Preamble to the Rome Statute of the International Criminal Court, UN doc. A/Conf.183/9, cited in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court* (2001).

⁴⁷ Final UN Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Economic and Social Council, E/CN.4/Sub.2/1997/20/Rev.1 (October 1997).

⁴⁸ E. Barkan, *The Guilt of Nations* (2000) xvii.

recognition that providing reparation contributes to justice and reconciliation in times of transition. In other words, the reparation movement to date has succeeded in putting the case for reparations on the international agenda, even if there is no universally accepted standard for implementing programs or an effective international mechanism for enforcing it.

The roots of official state-sponsored reparation programs, much like individual victim/offender reparation situations, can be traced to the international legal arena – even if these only go back less than one hundred years. One of the most well-known legal cases influential in spawning the movement to establish a legal right to state sponsored reparation programs was *Chorzow v. Factory (1928)*. *Chorzow* established the first principle relating to reparation in international law, whereby “any violation of an international norm entails for the state responsible the obligation to provide reparation”.⁴⁹ The other impact of *Chorzow* vis-à-vis human rights law is that in cases where human rights have been violated, the emphasis of reparation is on compensation versus restitution since, usually, the restoration of the status quo is not possible but some measure of repair may be feasible.

At present, numerous international covenants and bilateral agreements, resolutions and treaties since the Universal Declaration of Human Rights (1948) have refined the notion of “human rights” and more specifically of a “right to reparation”, and provided for their enforcement in international and domestic law. African countries adopted the African Charter on Human and People’s Rights in 1981, “reaffirming their adherence to the principle of human and peoples rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-aligned States and the United Nations”.⁵⁰ The four countries analysed below are all signatories of both the African Charter and the Declaration.

The most far-reaching guidelines on the right to reparation are found in the Draft Articles on State Responsibility of the International Law Commission of the United Nations⁵¹ and the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International

⁴⁹ See *Chorzow v. Factory (Germany v. Poland) (Merits) 1928 P.C.I.J. (ser A) No. 17*, cited in P. Sardaro, “The Right to Reparation for Gross and Systematic Violations from the Perspective of General International Law” in Report on the Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions (March 10, 2002) 15. According to Sardaro the relevant passage from the *Chorzow* case reads: “it is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation”.

⁵⁰ African Charter on Human and People’s Rights (1981).

⁵¹ “Draft Articles on State Responsibility”, adopted by the ILC drafting Committee, presented to the 2000 session of the ILC, annexed to UN Doc A/55/10.

Humanitarian Law⁵². Both are enshrined in the Resolution on the Questions of Independence of Judiciary, Administration of Justice, and Impunity, recently passed by the United Nations Human Rights Commission (April 2003). In addition to establishing “adequate legal or other appropriate remedies for any person claiming that his or her human rights have been violated”⁵³, the Draft Articles establish standards for reparation claims (i.e. claims may be made individually and, where appropriate, collectively, by direct victims, the immediate family, dependents or other persons or groups closely connected with the direct victims) and forms of reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Also, and relevant to this study, the Basic Principles limits the extent to which it is a duty to provide reparation in cases where violations of international norms have been committed. Though not legally binding, these principles are “already being used as an authoritative source of inspiration, including by the [International Criminal Court’s] Preparatory Commission and some national legislators.”⁵⁴

2.3.1.2 Socio-political approaches to reparation

Recent years have seen an increasing prevalence of reparation programs not based on the legal rights of victims or tied to judicial procedures, but rather as socio-political responses to popular mobilisations around issues associated with historical injustices. Reparation for slavery in the US, Australian Aborigines, Japanese American internees and Holocaust victims are some notable examples. Such state-sponsored reparation programs, or schemes, have been aimed at individuals as well as groups of victims previously harmed within the context of political oppression. Since, according to Barkan, after World War II “realpolitik as a factor in shaping political decisions has been replaced by ideology and ethical concerns”, nations have had to embrace their own guilt; “this national self-reflexivity is the new guilt of nations”, he writes⁵⁵. Therefore, “the need for restitution [i.e. reparation] to past victims,” writes Barkan, “has become a major part of national politics and international politics”⁵⁶. Moreover, he explains that a willingness to recognize the groups of victims grew out of the expansion of civil rights for individuals, who more often than not were members of victimized groups of people, e.g., women, minorities and indigenous people. The effect of this has influenced the modern discourse on restitution (i.e., reparation). According to Barkan:

⁵² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Commission on Human Rights, E/CN.4/Sub.2/1993/8 and a later version E/CN.4/1997/104.

⁵³ “Draft Articles on State Responsibility” (2002).

⁵⁴ S. Vandeginste, “Chapter 9: Reparation” in L. Huysse (ed.), Democracy and Reconciliation in Post-Conflict States: A Handbook (2003) 6.

⁵⁵ Ibid.

⁵⁶ Ibid. xxvi.

In their struggle for legitimacy, indigenous peoples present a major challenge to the contemporary nation-state's self-perception as a just society and a unified sovereign nation, and many of these debates are conducted within the framework of negotiating restitution.⁵⁷

Brooks offers a paradigm of four conditions necessary for the successful redress through non-judicial methods⁵⁸: (1) The demands or claims for redress must be placed in the hands of legislators, rather than in the hands of judges (By writing, "legislators, quite simply, can do more than judges", Brooks is clearly advocating a non-judicial approach over a judicial approach)⁵⁹; (2) Public pressure must be placed on lawmakers ("the success of any redress movement has depended largely on the degree of pressure (public or private) brought to bear on legislators – that is, politics – than with matters of logic, justice or culture"); (3) Strong internal support by victims can spur politicians to develop satisfactory non-judicial reparation programmes; and (4) Claims must be meritorious ("there must be something of substance for lawmakers to promote")⁶⁰.

In transitional justice contexts, Truth Commissions⁶¹ and National Administrative Bodies are the two most common types of "non-judicial processes" available as models for the implementation of reparation programmes, according to Vandeginste. Truth Commissions are on the transitional agenda as a recognised mechanism for dealing with past atrocities. According to du Toit, "if you try to ignore the issue ... it will come back in other ways, ways that are perverted and uncontrollable"⁶². Truth Commissions have proven suitable for comprising an element of "reparation", as defined holistically above. South Africa is often referenced in this regard for having implemented a truth commission that devoted serious attention to a broad reparation scheme, including investigation of possible financial reparations as well as symbolic measures, community reparation and institutional reforms⁶³. Truth commissions serve the twin objectives of revealing the truth regarding past atrocities and providing a venue for compensation to be paid to victims. A potential problem with the promise of truth commissions in delivering on this objective, clear in the South Africa case,

⁵⁷ Ibid.

⁵⁸ R. Brooks (ed.), When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice (1999) 6.

⁵⁹ Ibid. Brooks acknowledges, "Courts do however play a useful role in the process. They can and have been used to interpret and enforce extant rights and laws handed down by the legislature".

⁶⁰ Ibid. 7. Brooks refers to Mari Matsuda who identifies the following as prerequisites for a meritorious redress claim: "(1) A human injustice must have been committed; (2) It must be well-documented; (3) The victims must be identifiable; (4) The current members of the group must continue to suffer harm; and (5) Such harm must be causally connected to the past injustice." M. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations," Harvard Civil Liberties-Civil Rights Law Review (1987) 323, 362-97.

⁶¹ For a good overview of truth commissions around the world over the last 25 years, refer to the United States Institute of Peace, Library and Links Truth Commissions Digital Collection, found at <http://www.usip.org/library/truth.html>. See also Hayner (2001).

⁶² A. du Toit, "No Rest For the Wicked: Assessing the Truth Commission", *Indicator SA* (1997) 7.

⁶³ See, for example, A. Boraine, J. Levy, and R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa* (1995). See also De Grief, *Introduction in Handbook on Reparations* (ICTJ).

comes with truth commissions raising expectations of victims with implicit or explicit promises of reparation, even though they do not have authority to implement their own recommendations.

Of the cases where non-judicial reparation programs were adopted in the context of a political transition highlighted in the literature, those in Latin America figure most prominently. In Argentina, for example, reparation laws were established in 1994, ten years after the Truth Commission. There, family members of the disappeared are entitled to receive a lump sum of up to \$220,000. The Argentinean government has pledged \$3 billion to the reparation programs⁶⁴. In El Salvador, the truth commission recommended a special fund for awarding “appropriate material compensation”, though nothing has been done to provide reparation for victims of abuses during the country’s twelve-year war.⁶⁵

National administrative bodies (trust funds, compensation commissions, etc.) can be developed to coordinate the government’s efforts to process individual claims and to determine policies for societal reparation. Examples of cases where national administrative bodies were formed include Brazil, where in 1995 a Reparations Commission was established to compensate the relatives of 135 rebels who disappeared; Hungary, where in 1991 a National Damage Claims Settlement Office provided lump-sum compensation to victims of state seizure of property; and Chili, where in 1992 the National Corporation for Reparation and Rehabilitation was set up to implement the Chilean Truth Commission’s reparation recommendations⁶⁶. Some challenges and limitations emerging from these cases, according to Vandeginste, include: inability to meet state objectives and expectations because of under-funding and under-staffing; political interference and corruption; insufficient “civic” education about the programmes, and difficulty maintaining personal outreach to victims; and lack of funding⁶⁷.

Scholars and practitioners are somewhat divided on the importance of economic considerations in the development of official reparation programmes. Some say that financial concerns obfuscate the real issues – i.e., “making reparations or granting compensation to those who have been politically victimised is first and foremost not a financial issue. It is an issue of principle and policy,” write Hamber and Rasmussen.⁶⁸ Doug Cassel, however, includes economic factors in a matrix of factors that could account for the different positions of reparation on a transition agenda. He proposes these three factors: a) national political factors (number of victims, social class, relationship as a group to the post-transitional government, degree of

⁶⁴ See P. Hayner, *Unspeakable Truths*, 174-178.

⁶⁵ *Ibid.* 179 - 180.

⁶⁶ S. Vandeginste, “Chapter 9: Reparation” in L. Huyse (ed.), *Democracy and Reconciliation in Post-Conflict States: A Handbook* (2003) 156.

⁶⁷ *Ibid.* 154.

⁶⁸ B. Hamber and K. Rasmussen, “Financing a Reparations Scheme for Victims of Political Violence” in B. Hamber and T. Mofokeng, “From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence” (October 2000).

consolidation and democracy within the new government); b) economic factors (economic capacity, costs of full economic reparation); c) international context (historical moment of the given case, status of international law on reparations bilateral/multilateral relationships)⁶⁹. Still others, like Huyse, question the effectiveness of reparations in tackling the issue of social and economic inequality in societies where those inequalities are at the root of violence and conflict.⁷⁰ Huyse therefore stresses the need for reparation to be integrated into a broader policy of reducing those inequalities.

In a useful taxonomy of reparation efforts, De Greiff classifies elements across reparations programs, and in doing so, highlights some of the challenges and questions arising from massive, state-sponsored programmes⁷¹. For De Greiff, in addition the issue of “integrity or coherence”, or the relationship with other transitional mechanisms (described above), he lists the “scope” of the programme, or how many beneficiaries the programs cover, as one consideration in the development of a programme. The scope is not to be confused with the “completeness” of the program, or the ability of a programme to cover the “whole universe of potential beneficiaries”. The latter is determined by the evidentiary standard set as well as structural issues such as extensiveness of outreach of publicity and accessibility to the program. A related category is the programme’s “comprehensiveness”, or the catalogue of violations and harms it tries to redress. He writes that “all existing reparation programmes can be faulted for being insufficiently comprehensive”⁷². Consequently, there are usually continued efforts after a programme’s conclusion for increasing reparation claims for a larger number of victims. “All things considered,” writes De Greiff, “comprehensiveness is a desirable characteristic” for moral as well as political reasons.⁷³ He suggests that this element is connected to the legitimacy of the programme and its stability:

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 programme 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 take⁷⁴

Another element in De Greiff’s analysis is “complexity”, or the manner in which the programmes seek to redress crimes and harms done. For example, “a reparation programme is more complex if it distributes

⁶⁹ Expert Seminar, 86

⁷⁰ Ibid.

⁷¹ P. De Greiff, “Introduction” in Handbook of Reparations (2006), pp. 1 – 16.

⁷² Ibid., 7

⁷³ This is an important claim and is closely related to Barkan’s theory below. According to De Greiff, “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 virtues of the fact that we can consider our rule, one that we give to ourselves (ownership), where the ‘ourselves’ keeps growing (inclusion). *Introduction in Handbook* (ICTJ) 9.

benefits of more distinct types (i.e. apology and compensation, truth-telling and compensation), and in more distinct ways, than its alternatives”⁷⁵. In De Greiff’s taxonomy there is also the issue of “finality”, or whether the programme stipulates that other avenues of civil redress are closed or not. Finally, De Greiff asserts that “munificence” is a key consideration. “Munificence” is the magnitude of benefits given (from the perspective of the individual beneficiary)⁷⁶. However, like other factors, it is not necessarily a marker of success, according to De Greiff.

2.3.1.2.1 A Victim-centred approach to Reparation?

The promise and appeal of reparation is that providing reparation may be regarded as the only truly victim-centred approach. Of the various mechanisms utilised by successor governments to deal with the past (and there are five general categories of elements of transitional justice according to the International Center for Transitional Justice: reparation, prosecution, truth-telling, reconciliation and institutional reform) reparation along with truth-telling are primarily victim-oriented⁷⁷. Aryeh Neier’s assertion that, “If we fail to confront what happened to [victims], in a sense we argue that those people do not matter”, serves as a poignant mantra for transitional justice in general and the reparation movement in particular⁷⁸. Implementing reparations as part of a greater transitional justice program can contribute more than individual healing. As the summary statement from the IRDC/ICTJ symposium indicates, reparations foster “the sense that [victims] are rights-bearing citizens ... part of shared political community”⁷⁹.

Reparation can help relieve suffering and restore dignity to victims and, as such, is viewed as a necessary component of the individual healing process. But reparation should not be utilized in isolation as a strategy toward justice at times of transition. IDRC/ICTJ symposium participants concluded that “a free-standing reparations program, devoid of links to other aspects on behalf of victims, is likely to fail. Victims may perceive monetary compensation without parallel efforts to document the truth or prosecute offenders as insincere, or worse, the payment of blood money”⁸⁰. Determining which structure to utilize to implement reparations programs and what form(s) reparation will take are important considerations in the program itself.

⁷⁴ Ibid., 10

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ International Center for Transitional Justice and International Development Research Centre (ICTJ/IDRC) “Symposium Summary, Repairing the Past: Reparations and Transitions to Democracy” (March 11-12, 2004).

⁷⁸ A. Boraine, J. Levy, and R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa* (1995) 2.

⁷⁹ ICTJ/IDRC Symposium Summary (2004) 4.

⁸⁰ Ibid. 3.

Scholars and practitioners also suggest the importance of the *process* of developing reparation programmes as a determining factor in the success of the programs. Participants at the ICTJ/IDRC symposium “generally agreed that the design of a reparations program must include public consultation” and “the process of including victims not only recognizes the suffering of victims but also informs the content of a reparations program”. The symposium summary statement continues, “the process of victim consultation can also contribute to one of the overall aims of reparation programs, the recognition of victims and their experiences”⁸¹. Rombouts recommends that non-judicial reparation programs be oriented from the “bottom-up”⁸². This approach starts with the needs of victims: what injuries have they suffered and what they want from the government. This approach is “rarely adopted”, according to Rombouts, because of numerous challenges, among which are the likely large number of victims, the fact that many victims may be unable to speak with one voice, or that victims may be silent for social reasons (e.g., illiteracy and/or poverty) or from fear or other political/community/family pressures.⁸³

2.4 Reparation as Negotiated Justice

In The Guilt of Nations, Barkan develops a suggestive, more general theory of restitution (i.e., reparation)⁸⁴ that is grounded in the notion that victims and perpetrators each play a critical role in the process. For Barkan, much like De Greiff, a state-sponsored restitution program is a process, “a negotiated justice”, where the legitimacy and recognition of the claims of all stakeholders in a post-conflict situation is desired not as a means but an end in itself. In developing a national reparation scheme, countries engage in a process that takes place in the first instance between victims and perpetrators, but also affects the entire society. Barkan suggests, “Restitution replaces a universal comprehensive standard of justice with a negotiated justice among the opposing parties in specific cases”⁸⁵. Barkan emphasizes the role of restitution as recognition, whereby previously disenfranchised groups are now given legitimacy and voice through the process of determining restitution at the highest level of the state governance:

[Restitution] underscores a milieu in which many nations and minorities see greater benefits to themselves in conducting dialogues and reconstructing shared pasts as the basis for both recognition of their identities and reconciliation. Since the desire for recognition is insatiable, restitution is a process, an ideology, but not a home. It is possible to imagine a principled end to the process of restitution but not a specific situation. For example, the restitution of indigenous rights leads to

⁸¹ ICTJ/IDRC Symposium Summary (2004) 5.

⁸² H. Rombouts, “Reparation for victims of gross human rights violations: A socio-political approach”, in A Report on Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions (March 10, 2002) 40 – 41.

⁸³ Ibid.

⁸⁴ Barkan refers to “restitution” more comprehensively to “include the entire spectrum of attempts to rectify historical injustices”. E. Barkan, The Guilt of Nations: Restitution and Negotiating Historical Injustices(2000) xix.

⁸⁵ Ibid. 309.

recognition of the group, which legitimises the group's claims and leads to further discussion of new rights and to a growing inclusion of the indigenous story in the culture of the mainstream.⁸⁶

The relative strength of victims grows when victims and perpetrators are engaged in “negotiating a resolution of historical crimes”, according to Barkan⁸⁷. Increased strength begets political force (i.e., more political capital), which may contribute to change in policies at the local and national levels. The impact of reparations on social and political transformation is greater, therefore, not necessarily as a result of a pay-out of compensation for harms done or the construction of towering monuments, but rather because of, and through, the negotiated justice between victims and perpetrators. While this is the foundation of a theory of restitution and an apt description of a new international moral framework, it is, according to Barkan, “clear that the standards vary and also that there is no accepted threshold for moral action or agreement. There is, however, a mechanism of negotiation and an aspiration of justice.”⁸⁸

Perhaps fostering a new and improved shared political community is the greatest – and most difficult – promise of contemporary state-sponsored reparations programs. The emphasis here is on the process; it is both a means and an ends of the overall reparation program. Putting money into the pockets of former victims may not in itself achieve justice, though it may advance the aims of justice in a transitional setting. Including victims in the process – fostering a sense of their importance in the democratic process – goes much further to facilitating political and social transformation because it erodes away the culture of impunity for perpetrators and fear among victims. There is symbolic importance to how the “reparation” is made and by whom. If compensation is processed by officials in a bureaucratic process, with no acceptance that harm was done, with no public acknowledgement of responsibility it is likely to be of little consolation to victims. The timing, sensitivity and symbolism of the process all are important factors in the value of the program to victims. A formal reparation programme within a government sponsored program of communal and political reconciliation can legitimate civil society organizations because it fosters connections between government, civil society, and victims.

The above propositions, formed through normative and empirical study and put forth by the foremost scholars in the field, will be a base for analysis of the Southern African cases. With the following sections, I now move from the general to the local. The following chapter chronicles the experiences of South Africa, Malawi, Zimbabwe and Namibia in turn, while the concluding chapter analyses the politics of reparation programmes across these specific and differing country experiences.

⁸⁶ Ibid. 320.

⁸⁷ Ibid.

University of Cape Town

⁸⁸ Ibid. xviii.

3. Country Case Studies:

A Comparative Account of Reparation Processes and Mechanisms in Southern Africa

This section offers a description of the experiences of South Africa, Malawi, Zimbabwe and Namibia with respect to the development or non-development of state-sponsored reparation programs¹ after a political transition. Considering the extent of the attention received by the South African case, relative to the three others, this chapter does not deal with four independent case studies of equal interest and significance. Still, implicitly and explicitly, the other case studies, which were not part of an official and holistic truth and reconciliation process, invite comparison with the South African case. Moreover, they are comparatively unknown. This provides a rationale for the survey. The similarities as well as differences of these case studies will be considered more systematically in Chapter Four, in determining the implications for the different approaches to reparation and the relevant socio-political-economic factors that contribute to the development (or non-development) of reparation programs.

At the outset, we must bear in mind there is little consistency in reparations programmes across the cases. Simply put, each country has pursued a very different kind of reparations programme; Namibia has done virtually nothing to date. The dynamics of each case also vary widely, as do the current (and historic) socio-political and economic climates of the countries surveyed. This lack of consistency makes it difficult to focus the analysis sharply on a particular sense or aspect of reparation, and underlines the need to avoid hasty and superficial generalisations in the analysis.

The case studies conducted here will be concerned with investigating four overriding questions:

- 1) What is the historical background of gross human rights violations and claims for reparations?
- 2) What is the transitional context?
- 3) What were the transitional justice mechanisms (i.e. Reparation and Amnesty, Reconciliation, Truth-telling) utilized in that context?
- 4) What were the objectives and means, process and outcomes, reception and assessment of the programmes of reparation that were developed?

A fifth question – what, if any, rationale can be identified for the non-development of reparation programmes? – will be applied to the case of Namibia, where no such programme was developed.

¹ As noted in the previous section, the examination of “reparation” in these cases conforms with Hayner’s definition. It does not include land restitution, however.

3.1. South Africa

In April 1994, the first democratic elections in South Africa resulted in victory for President Nelson Mandela and his political party, the African National Congress (ANC). Mandela's rise to power brought to an end the system of Apartheid, a legal system of racial discrimination, exploitation and segregation. Apartheid itself was ruled a "crime against humanity" by the United Nations². The origins of the reparation question in South Africa can be traced to the wrongs of the Apartheid era, when human rights abuses by the state, as well as by the forces resisting the apartheid regime, were rampant. The electoral victory of the ANC in the founding election of 1994 was the culmination of decades of "liberation struggle" led by the ANC and joined by numerous other factions, inside and outside South Africa.

Since 1994, South Africa has undergone what has been characterised as "probably the most publicised and celebrated post-conflict transition process undertaken in the last 50 years".³ A notable element of this transition was the Truth and Reconciliation Commission (TRC) process. South Africa's reparation programme was part of a comprehensive approach to transitional justice that included amnesty and truth telling within the national TRC process, along with separate initiatives around land restitution and affirmative action and a range of policies aimed at desegregation and black empowerment. The rationale for, and promise of, reparation is brought out by this comment found in the TRC Report:

If we are to transcend the past and build national unity and reconciliation, we must ensure that those whose rights have been violated are acknowledged through access to reparation and rehabilitation. While such measures can never bring back the dead, nor adequately compensate for pain and suffering, they can and must improve the quality of life of the victims of human rights violations and/or their dependants ... Without adequate reparation and rehabilitation measures, there can be no healing and reconciliation.⁴

The TRC Act established the Reparation and Rehabilitation Committee (RRC) – next to the Human Rights Violations Committee (to investigate and document human rights abuses) and the Amnesty. The TRC did not have powers to implement reparations directly (except for urgent interim cases; see below), but could make recommendations to the government for providing "measures to be taken in order to grant reparation to victims of gross human rights violations"⁵. Thus reparation was one part of a holistic TRC process. As will be seen below, it also came to be regarded as the least effective as well as the most controversial element of the TRC process.

² See International Convention on the Suppression and Punishment of the Crime of *Apartheid*, General Assembly resolution 3068 (XXVIII) (30 November 1973) *entry into force* (18 July 1976) in accordance with article XV, found online at <http://www.unhcr.ch/html/menu3/b/11.htm> (February 2005).

³ C. Colvin, "Overview of the Reparations Programme in South Africa," CSVR Report commissioned by ICTJ (2003).

⁴ *TRC Final Report*, Vol. 5, Ch. 5, Section 2, 174 – 175.

⁵ Promotion of National Unity Act, found online at <http://www.gov.za/acts/1997/a84-97.pdf> (1995) Sect.1(1)(xix)(a).

3.1.1. Historical Background of Gross Human Rights Violations and Claims for Reparations

Since one mission of the TRC was to investigate “gross human rights violations” occurring in South Africa from 1960–1993, the TRC Report (submitted in 1998, with an updated report released in 2003) deals extensively with the nature and extent of human rights violations. The TRC Report found that the Apartheid state committed numerous human rights violations against its own people. However, the struggle for a new South Africa was not without violence, pain, suffering and human rights abuses, so that victims and perpetrators were to be found on both sides. In fact, political violence escalated as the negotiations took place. In the time period of the formal negotiations (1990–1994) between the South African government and the African National Congress, among other political groups, approximately 13,000 people were killed as a result of political violence, in comparison with the figure of approximately 5,390 in the previous five years.⁶

3.1.1.1. Context of Transitional Justice

The TRC was mandated in the Promotion of National Unity and Reconciliation Act (TRC Act) of 1995.⁷ Discussions about perpetrators and the need for retributive justice (or amnesty) garnered much more weight in the lead up to the development of the TRC than discussion about victims and reparation. In fact, the claims for reparation (e.g. compensation) played second fiddle to public debates about amnesty for perpetrators and mechanisms for “truth-telling” by victims and perpetrators, and perhaps ironically came into being only as a by-product of the protections provided for perpetrators, such as amnesty and special pensions. The original negotiated settlement was primarily perpetrator-focused in its concern with amnesty. In the final settlement, hammered out by government officials and ANC representatives and articulated in the Postamble to the Interim Constitution, it was agreed that there would be amnesty for perpetrators, though not a “blanket” or “general amnesty”. In this regard, the Postamble provided a notable and seminal articulation of the general notion of reparation and restorative justice:

This Constitution provides an historic bridge between the past of a deeply divided society characterised by strife, conflicts, untold suffering and injustice, and a future founded on human rights, democracy and peaceful coexistence for all South Africans ... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. ... In order to advance such reconciliation and reconstruction, amnesty shall be granted .. To this end Parliament shall adopt a law ... providing for the mechanisms, criteria and procedures ... through which such amnesty shall be dealt with ..⁸

⁶ South African Institute of Race Relations, *Fast Facts* (March 1996), cited in Ball (1997) 67.

⁷ *Promotion of National Unity and Reconciliation Act*, No. 34 of 1995, (July 26, 1995)

⁸ *Postamble, Interim Constitution* (1993).

It is important to note that the negotiations surrounding the amnesty provision were complex and contentious. While the governing National Party called for general amnesty, the ANC proposed a provision that included amnesty only for those who were willing to disclose their crimes⁹. The amnesty provision continued to cause much strife throughout the TRC process, most notably between the ANC and TRC. For the ANC members, the crux of the issue was having to apply for amnesty in the first place. At one point in 1997, Desmond Tutu threatened to resign after the ANC declared that its members would not be applying for amnesty. The ANC's National Executive Committee, however, compromised its position with this statement: "... in the case of the ANC neither it nor any of its members were ever involved in any crime against humanity. On the contrary, the ANC was involved in a just and heroic struggle. However, where in the course of that struggle violations of human rights did occur these must be acknowledged."¹⁰ In the end, the ANC did participate, but many of its leadership, including the future South African President, Thabo Mbeki, never fully embraced the TRC process. This is one explanation, though by no means the only factor, for the government's delayed and unsatisfactory response 5 years later to the TRC recommendations on reparation.

In the context of the founding election in 1994, proposals for a Truth Commission involving a more victim-oriented approach were first advanced by human rights groups based in civil society. Significantly, this involved a central concern with reparation for victims, in conjunction with the agreed amnesty for perpetrators. Dr. Alex Boraine, former Executive Director of IDASA who had set up a organization for addressing transitional justice matters in South Africa, drew these connections in a draft proposal of a TRC process that he submitted to President Mandela in 1994. In a section discussing how a Commission of Truth and Reconciliation could assist the national healing process, he wrote:

If dignity is to be restored to the thousands of victims who have suffered under the apartheid system, then these violations have to be known and acceptance of this has to be public rather than private. It follows that if the truth is known about the victims' plight, then a further question has to be raised about compensation. It is impossible to do this adequately without knowledge and detail of the violations.¹¹

By mid-1994, these proposals were accepted in principle by the ANC Minister of Justice, Dullah Omar. Omar announced that Parliament would consider legislation for the formation of an official Truth and Reconciliation Commission. Henceforth, the tense relationship among amnesty, truth-telling and reparation defined South Africa's transitional justice and peacebuilding process. On the one hand, there was a strong relationship between truth-telling and amnesty, with the former considered a necessary precondition of the

⁹ A. du Toit, "No Rest Without the Wicked" (1997) 9 - 10.

¹⁰ A. du Toit, "Perpetrator Findings as Artificial Even-Handedness" (unpublished paper) 8, found in A. Boraine, *Country Unmasked* (2000) 324.

¹¹ A. Boraine, *Country Unmasked* (2000) 33.

latter. On the other hand, amnesty and reparation were connected in so far as reparation was considered as a necessary counter-balance to the amnesty that had been mandated by the Post-amble of the Interim Constitution¹² and the TRC Act. As Yasmin Sooka (a member of the TRC) writes, amnesty was to occur in the context of a comprehensive process with sufficient counter-balancing measures for victims:

The amnesty clause ... in the [South African] Constitution, which gave rise to the establishment of the TRC, was seen as a bridge to building a new society within which former enemies would find meaningful ways to live together. It was not envisaged that this would take place against a background of amnesia, but that the process of gaining amnesty demanded accountability, truth-telling acknowledgement of victims and a proper process of reparation.¹³

This significance of reparation to victims as counterbalance for the amnesty to be provided for perpetrators was further brought out in an important judgement by the new Constitutional Court at the beginning of the TRC's activities in 1996. One of the key elements in the amnesty provision of the TRC is that a person to whom amnesty was granted is relieved of all criminal and civil liability for the specific act for which amnesty was granted. This provision effectively negated a victim's ability to pursue civil damages in the courts. This was at the heart of the seminal and controversial Constitutional Court case, *AZAPO v. President of South Africa* (1996). The applicants¹⁴ wanted an order declaring the amnesty provision of the TRC Act, Section 20(7), unconstitutional on the grounds that it unfairly and unlawfully deprives victims of the right of redress.¹⁵ The Constitutional Court upheld the constitutionality of the amnesty provision. Its argument, presented by the Deputy President of the Court Judge Ismail Mahomed and J. Didcott, in a separate concurring statement¹⁶, rested on four justifications, one of which was that the expunging of civil and criminal liability through amnesty would be sufficiently counter-balanced by the reparation provision of the TRC Act, Section 4(f).¹⁷ In a basic sense, the Constitutional Court thus linked the provision of amnesty for perpetrators with the quid pro quo of reparation to victims.

¹² *Postamble, Interim Constitution*, found online at <http://www.gov.za.constitution/1993/1993cons.ktm>

¹³ Y. Sooka, "Peace with accountability and respect for human rights: Ensuring sustainable dividends for the future", *Track Two* (March 2002) 3.

¹⁴ The applicants were Azanian People's Organisation (AZAPO); Nontsikelelo (Ntsiki) Biko, widow of slain ANC leader, Steve Biko; Churchill Mhleli (Mbasa) Mxenge, brother of Griffiths Mxenge, an activist who was brutally murdered by security forces; and Chris Rebeiro, whose parents, Fabian and Florence, had been assassinated on the instructions of the security police.

¹⁵ Boraine pointed out that "the [TRC Act] goes even further and lays down that neither the state nor any other body, organisation, or person (and this would include political parties) that would ordinarily have been vicariously liable for such an act could be liable in law".

¹⁶ See summary of Constitutional Court Judgment involving *AZAPO et al*, found on the Web at www.doj.gov.za/trc/legal/azaposum (July 25 1996). See also the full text of the Constitutional Court Judgment involving *AZAPO et al*, found on the web at www.doj.gov.za/trc/legal/azapofin (July 26 1996).

¹⁷ The other justifications were that: amnesty for criminal liability was allowed by the Postamble of the Interim Constitution on the premise that without it there would be less incentive for much-needed truth-telling; amnesty was a political decision, not a legal or human rights decision, made during the negotiated settlement that resulted in the new democratic government; such a policy is in compliance with international law.

Despite the relative lack of attention given to the reparation question at the outset of the TRC, the subject took on greater meaning as the process unfolded. In South Africa, reparation came to be considered essential to reconciliation. As stated above, the TRC Final Report held that “without adequate reparation and rehabilitation measures, there can be no healing or reconciliation”.¹⁸ According to key members of the RRC and the Commission, the promise of reconciliation in South Africa depended on reparation. TRC Commissioner Wendy Orr writes: “Reparation delayed will mean healing retarded, and perhaps a deepening perception of justice denied”.¹⁹ Journalist and poet Antjie Krog wrote that reparations would “make or break” the TRC, and the Chairperson of the Reparation and Rehabilitation Committee, Ms. Hlengiwe Mkhize, said that the “credibility” of the process would depend on how the government tackles reparations.²⁰ The TRC process, however, did not fully achieve this central commitment to reparation which in the aftermath of the Commission itself increasingly became a contested issue.

3. 1. 1. 2 The TRC's definition of victims of gross violations of human rights

The Promotion of National Unity Act 1995 (herein known as the “TRC Act”) defines a gross violation of human rights as the “violation of human rights through – the killing, abduction, torture or severe ill-treatment of any person, or any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred [to above]”.²¹ Significantly, this definition did not include such crucial elements of apartheid as forced removals and dispossession of land, group areas, the implementation of the pass laws, Bantu education etc. In a linking definition, a “victim” was defined as 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” during the period of 1960 - 1993.²² This again did not include the victims of such apartheid injustices as forced removals, group areas, Bantu education, etc. The historical injustices of conquest, slavery and dispossession of land during the colonial period were likewise excluded as a basis for reparation since they pre-dated the TRC’s narrow timeframe of 33 years.

It followed that the narrow definitions of “gross violations” and “victims”, together with the corresponding stipulation that reparation would go only to “victims” in this sense of gross violations of human rights, significantly limited the TRC in its recommendations for individual reparation. At the conclusion of the TRC, the number identified as “victims” totalled almost 22,000 – and it was this group for whom

¹⁸ See TRC Report, Vol. 5, Chapter 5, Sections 94 - 115,

¹⁹ W. Orr, “Reparations delayed is healing retarded”, in M. Meredith, Coming to Terms: South Africa’s Search for Truth (1999) 247.

²⁰ Interview with Ms. Hlengiwe Mkhize, Chairperson, Reparation and Rehabilitation Committee, in Truth Talk: The Official Newsletter of the Truth and Reconciliation Commission (1998).

²¹ Promotion of National Unity Act found online at <http://www.gov.za/acts/1997/a84-97.pdf> (1995), Sect. 1 (1)(ix).

²² *Ibid*, Section 1 (1)(xix)(a).

compensation measures were recommended. Victims had to make statements before the TRC and then the Commission's Investigative Unit investigated each statement to determine whether there was sufficient evidence to corroborate the individual's claim that she or he was a victim of gross human rights abuses, as defined in the Act²³.

There was much acrimony and controversy around this narrow definition of victim as it relates to reparation. In the TRC Report, there are indications that the Commission itself had reservations with defining "victim" in this way for the purpose of developing recommendations for reparation. The Commission noted, disapprovingly, that "victim" was given a definition "based on the specific violation experienced by the individual – that is, killing, abduction, torture or severe ill-treatment. It is not a term based on the individual's current state or understanding of himself or herself"²⁴. This "violation-based" definition was "unsatisfactory" to the Commission "in that it promotes a homogeneous grouping of those who approached the Commission and has the potential to stifle creative approaches to the issue of reparative interventions."²⁵ In practice, though, the TRC established that "victims" eligible to receive compensation from a state-sponsored reparation scheme were those individuals who had suffered from a human rights violation *and* who made a statement before the TRC²⁶. In many cases, relatives and dependents of victims were also eligible for reparation. Despite its own expressed reservations the operative definition of "victims" for the purposes of its proposed reparation measures was thus that of the narrow "violation-based" definition.

A different kind of controversy was involved in the Commission's impartial approach to victims of gross violations of human rights. While the TRC acknowledged that the great preponderance of human rights violations were committed by agents of the apartheid state, it conceded that the liberation movement also committed human rights violations. The "artificial equality" of this approach, effectively equating the victims of the human rights violations by the apartheid state and the victims of human rights violations committed in the course of the liberation struggle was highly controversial²⁷. The ANC challenged this moral equation of victims on grounds that it had been involved in a just and heroic struggle. According to TRC Deputy Chair, Alex Boraine, the Commission's findings followed Geneva Convention principles, which allow for a "just" war, but are "clear that if gross human rights violations are committed during the course of this just war, then those who engage in such actions must accept moral and political responsibility"²⁸. Du

²³ E. Daly, "Reparations in South Africa: A Cautionary Tale" (2003) 4. See also, TRC Report (1998), Vol. 5, Ch. 1, found online at <http://www.stanford.edu/class/history48q/Documents/EMBARGO/5chap1.htm>.

²⁴ TRC Final Report, Volume 6, Section 2, Chapter 1, footnote 7 (March 2003).

²⁵ *Ibid.*

²⁶ TRC Final Report (2003), Vol. 6, Sec. 2, Ch. 7, 160 - 162

²⁷ See, for example, A. Boraine, Country Unmasked (2000), 317 – 321. In this section, Boraine details that the controversy was so intense from within ANC ranks once the Commission announced its findings on the ANC that the ANC took the entire TRC process to court.

²⁸ *Ibid.*, 322. See also page 325.

Toit argues that the TRC did not make “the fatal error of ‘a moral equation’ between the inherent evils of apartheid and the just cause of the liberation struggle”, and that by accepting the terms of the TRC in the first place, the ANC was bound to take the high road once the findings were presented²⁹. Indeed, in 1997 the ANC eventually issued a statement accepting that “where during the course of the struggle violations of human rights did occur these must be acknowledged”³⁰. This implied that victims of the ANC’s own human rights violations during the course of its liberation struggle would also be entitled to reparation.

On this issue, the TRC Report reads: “The Commission was obliged by statute to deal even-handedly with all victims ... this does not mean ... that moral judgment was suspended or that the Commission made no distinction between violations committed by those defending apartheid and those committed to its eradication”.³¹ Thus the TRC acknowledged victimization across the political spectrum because perpetrators could be found on both sides. The implication of this was that a “victim” as defined by the TRC could even be an official of the Apartheid state, meaning that person could also be entitled to reparation.

In determining victimization for the purposes of reparation, the TRC dealt with another challenging issue: apartheid itself as a crime against humanity. According to the UN, the system of apartheid is a crime that entails “inhuman acts, committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”.³² Under apartheid, the majority of South Africans (mostly Black) experienced repression in different forms at the hands of minority rule (mostly White). Indeed, as clarified in the TRC Report, the whole of society suffered under the “crime of apartheid” even though some individuals suffered specific human rights abuses as defined by the TRC. The TRC Report showed,

... It can never be forgotten that the system itself was evil, inhumane and degrading for the many millions who became its second and third class citizens. Amongst its many crimes, perhaps the greatest was its power to humiliate, to denigrate and to remove the self-confidence, self-esteem and dignity of its millions of victims ...³³

The issue of societal victimization alongside individual victimization was similarly highlighted in the following comments by Dullah Omar, South African Minister of Justice, on the TRC process: “TRC victims are individuals, a legal category, but there are also victim communities, all black South Africans were

²⁹ See “Perpetrator Findings as Artificial Even-Handedness? The TRC’s Contested Judgments of Moral and Political Accountability for Gross Human Rights Violations” (unpublished), cited in Boraine, *Country Unmasked* (2000), 324.

³⁰ Boraine, *op. cit.*

³¹ *TRC Final Report*, Volume 1, Chapter 4, Paragraph 60 – 61.

³² See Article 2, International Convention on the Suppression and Punishment of the Crime of Apartheid, United Nations, found online at UN Info, <http://www.hri.ca/uninfo/treaties/11.shtml> (November 30, 1973).

³³ *TRC Final Report*, Volume 1, Chapter 4, Paragraph 51.

victims, and there were victim communities: [South Africa] is a nation of victims.”³⁴ However, “victims of apartheid” in this extended sense could *not* be recognized by the TRC as entitled to reparation.

3.1.2. The RRC and Reparation as a general mandate of the TRC

Section 4 (f) of the TRC Act charged the TRC with making recommendations to the President with regard to:

- The policy that should be followed, or measures which should be taken, with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims;
- Measures that should be taken to grant urgent interim reparations to victims³⁵.

The Act defined reparation broadly, as including “any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition”.³⁶ Section 25(b)(i) of the TRC Act stipulated that the RRC could “make recommendations which may include urgent interim measures as contemplated in section 4(f)(ii), as to appropriate measures of reparation to victims.”³⁷ The TRC Act also provided guidelines for the other committees of the TRC to refer matters related to victims of gross violations of human rights to the RRC. For instance, “When the Committee [on Human Rights Violations] finds that a gross violation of human rights has been committed and if the Committee is of the opinion that a person is a victim of such violation, it shall refer the matter to the Committee on Reparation and Rehabilitation for its consideration in terms of section 26.”³⁸ With regards to the Amnesty Committee, “Where amnesty is granted to any person in respect of any act, omission or offence and the [Amnesty] Committee is of the opinion that a person is a victim in relation to that act, omission or offence, it shall refer the matter to the Committee on Reparation and Rehabilitation for its consideration in terms of section 26.”³⁹ Even if amnesty is refused, the Amnesty Committee could refer to the RRC offences in question that constituted a gross violation of human rights.

3.1.2.1. The RRC: aims, functions, activities

The mandate of the RRC involved, on the one hand, the development of a broad framework for the TRC’s holistic approach to reparation as part of the general truth and reconciliation process and, on the other hand, the formulation of specific measures of reparation as recommendations. Following internationally accepted

³⁴ Interview with Minister Dullah Omar by Oupa Makhamele (April 26, 2002).

³⁵ See TRC Act (op. cit.) Section 4(f).

³⁶ Ibid., Chapter 1 (xiv).

³⁷ TRC Act Section 25(b) (i).

³⁸ TRC Act Section 15 (1).

³⁹ TRC Act, Section 22.

approaches to reparation and rehabilitation, the RRC recognized all of the following as possible components of a holistic approach to reparation⁴⁰:

- Redress: the right to fair and adequate compensation;
- Restitution: the right to the restoration, where possible, of the situation existing prior to the violation;
- Rehabilitation: the right to medical and psychological care, as well as such other services and/or interventions at both individual and community level that would facilitate full rehabilitation ;
- Restoration of dignity: the right of the individual/community to an acknowledgment of the violation committed and the right to a sense of worth, and,
- Reassurance of non-repetition: the right to a guarantee, by means of appropriate legislative and/or institutional intervention and reform, that the violation will not be repeated.

The RRC engaged in a wide-ranging exploration of issues around reparation in the South African context before proceeding to more specific recommendations and proposals. In doing so, the RRC opted for a holistic approach that set the standard for today's broad conceptualization of reparation as a mechanism in transitional justice. This was significant in its comprehensiveness, as defined by De Greiff and explored in the previous chapter, but also for its boldness. Such a comprehensive approach led to heady expectations, even if in accordance with international standards, and the South Africa case would test, in practice, the feasibility of such a bold, comprehensive approach.

Within the TRC's holistic approach, a number of difficult problems had to be addressed and resolved. One of the key issues was whether reparation should also be symbolic in nature or mainly financial. Although the reparation policy of the RRC committee was decidedly not limited to financial compensation only, but comprehensive in its intent, the TRC did include financial compensation as part of its recommendations. The RRC debated the merits of a "well-structured monetary grant" versus those of a service package because most victims indicated that they preferred monetary assistance to other forms of compensation⁴¹. Victims identified needs ranging from finding housing to paying for children's education to paying for medical expenses⁴². Since victims' needs were so diverse, the advantage of monetary grants were that these could encourage access to essential basic services and give rise to opportunities, which would facilitate the achievement of a better standard of living. Ultimately, the TRC decided against a service package, as it "would add an unnecessary administrative layer, would exacerbate tensions between those communities that

⁴⁰ See TRC Report, Vol. 5, Chapter 5, Sections 94 - 115

⁴¹ See TRC Final Report (2003), "The Argument for Reparation: What Victims Say", Volume 6, Section 2, Chapter 4

⁴² Ibid.

had special entitlement to community services and those who did not, and would not be as flexible or as susceptible to the evolving needs of recipients”⁴³. The Commission, writes Daly, “seems to have chosen the option that provides maximum income to victims at the earliest possible opportunity”⁴⁴. Ironically the government then subsequently dragged its feet for several years before implementing even part of the TRC’s reparation recommendations. Moreover, while the TRC had recommended individual reparation payments spread over six years the government opted for once-off payments at a reduced level⁴⁵.

Another key issue in the development of the recommendations was that of who would pay the bill? The TRC grappled with the underlying moral and theoretical problems that the present generation and/or successor regime had to foot the bill for reparations of past atrocities. At a practical level, there was, in fact, a spectrum of available options, ranging from summary confiscations through once-off targeted wealth taxes to merely symbolic reparations.⁴⁶ Mbeki silenced the recommendation put forth by the TRC for a once-off wealth tax, instead encouraging all South Africans to contribute to the Fund. He declared in his April 15, 2003 speech,

While government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.⁶³

Some, like Yasmin Sooka, a TRC Commissioner, remarked on the irony and tragedy of the new government paying for the sins of past generations: “What is tragic is that the new government, who inherited a bankrupt structure, has to bankroll reparations for the sins committee by the past government. Those who benefited from the spoils of apartheid are still benefiting. There has been no special tax imposed, no need for any act of personal contrition, no need for an act of restitution to the victim directly, no loss of jobs or land.”⁴⁷ The final recommendation of the RRC in the TRC Report was to establish a “President’s Fund,” operated through the Department of Justice, for the purpose of paying out compensation to victims. Eventually, the government, along with individuals and some businesses, contributed R800 million in 2001 to the President’s Fund.

Yet another emerging question in the RRC discussions was that of how to determine the amounts of the financial grants to be awarded to victims. Should the amount be based on the severity of the injury or on the

⁴³ E. Daly, “Reparations in South Africa: A Cautionary Tale” (2003) 5.

⁴⁴ Ibid.

⁴⁵ See TRC Report, Vol. 6, Chapter 1, Section 2, 95

⁴⁶ S. Gutto, “Constitutional, International and Comparative Law: Perspectives on Reparation” in From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa (2000) found online at www.csvr.org.za/papers/papr2r5.htm.

⁴⁷ Report of the Conference on Reparation and Memorialisation: The Unfinished Business of the TRC, printed in Independent Newspapers (circa 1997).

financial status and/or needs of victims? On moral grounds, the RRC agreed that “if reparation was an acknowledgment of the fact of the violation, anyone who has been violated should receive the same amount”.⁴⁸ Pragmatically, the RRC determined that it would not be cost effective to implement “means testing” for excluding those few who were not poor⁴⁹.

A more fundamental problem was that, with the exception of Urgent Interim Reparations, the RRC could only make recommendations and had no powers to implement reparation, a reality that caused some commissioners considerable consternation, according to TRC deputy-chair Boraine⁵⁰. Hours and hours of discussing proposals without any ability to implement these created the feeling that very little progress was being made. There was a prevalent feeling that the RRC should have had at least some implementation powers in order to carry out its policy and recommendations expeditiously.⁵¹ Wendy Orr (deputy chairperson of the RRC) writes of the frustrations created by the advisory status of the Commission: “We were not implementers – we were proposers. But victims found it (understandably) difficult to make this differentiation ... This delay in delivery of reparation, particularly contrasted with the ‘immediate delivery’ of amnesty, was perhaps the most distressing issue for victims and organisations representing victims.”⁵²

The bottom-line was that the TRC had no budget for implementation of its proposals for reparation. Some commissioners felt so helpless in their official capacity that they took it upon themselves to pay money out of their own pockets to assist victims⁵³. In practice the RRC’s activities were confined to investigation, consultation and advisory roles. The RRC of the TRC collected information from a variety of sources, including victims and survivors, representatives of NGOs and community based organisations, faith communities and academic institutions⁵⁴. In addition, consultative workshops were held throughout the country to: “a) Establish harm suffered; b) Determine the needs and expectations of the victims; c) Establish criteria to identify victims in urgent need; and d) Develop proposals regarding long-term reparation and rehabilitation measures”.⁵⁵ While the RRC spent considerable time and effort in formulating

⁴⁸ W. Orr, “Reparations delayed is healing retarded”, in M. Meredith, Coming to Terms: South Africa’s Search for Truth (1999) 247.

⁴⁹ See B. Hamber, “Repairing the Irreparable” (2000), found online at <http://www.csvr.org.za/papers/paprepbh.htm>. He writes of this decision: “Seemingly, this is dismissed due to cost, and the resources necessary for grading the psychological and physical injuries of the approximately 20,000 victims.”

⁵⁰ A. Boraine, Country Unmasked (2000) 336.

⁵¹ See, for example, W. Orr, “Reparations delayed is healing retarded”, in M. Meredith, Coming to Terms: South Africa’s Search for Truth (New York: Public Affairs, 1999), p. 242.

⁵² Ibid.

⁵³ A. Boraine, Country Unmasked (2000) 336.

⁵⁴ Most of the minutes of these meetings can be found at <http://www.truth.org.za>.

⁵⁵ C. Colvin, “Overview of the Reparations Programme in South Africa,” CSV Report commissioned by ICTJ (2003) 16; and Interview with Ms. Hlengiwe Mkhize (1998).

recommendations, according to the Executive Secretary of the RRC, Barbara Watson, “the aim of the Committee was also to establish a sustainable support base for victims”⁵⁶.

A critical component in developing reparation proposals, while simultaneously building a support base among victims, was public forums held in order to glean what victims themselves wanted in the way of reparation. According to Boraine, the Commission asked every victim that appeared before the commission at the public victim hearings “what the TRC could do for them”.⁵⁷ Giving deference to victims in the formulation of recommendations may have engendered vital initial support among victims and victim groups, but ironically it also meant a delay in formulating recommendations as well as in the process of distributing urgent interim reparations. “Months and months went by during which we continued to receive victims,” writes Boraine, “conduct victim hearings, take statements, and analyse those statements, and this meant an inevitable delay in responding to the requests.”⁵⁸ The problems of this delay were exacerbated when juxtaposed with the relative speediness with which amnesty occurred – those granted amnesty were released from prison within hours of being granted amnesty. Boraine admits that the commissioners did not anticipate this juxtaposition, “and it caused a great deal of agony among the members of the Reparation and Rehabilitation Committee and the Commission as a whole.”⁵⁹

Certainly, one of the greatest contributions of the TRC was the establishment of an historical and public record of gross violations of human rights. The RRC had as its mandate to reinforce this record by conducting a thorough investigation to understand the psychological and physical consequences of gross human rights abuses for victims in the South African context, as well as the ensuing needs for appropriate reparation. This investigation was guided by four questions: “What enduring effects have the conflicts of the past had on social values and ways of life? What were the spiralling implications for families and communities? What had been identified as necessary action for dealing with these problems? What contribution could the Commission make in addressing these problems?”⁶⁰ The answers to these questions were published in the TRC report⁶¹ and provided the basis for the RRC and the Commission’s more specific recommendations on reparation.

3.1.2.2. Recommendations for Reparation in the TRC Report

⁵⁶ According to the Executive Secretary of the RRC, Barbara Watson: “The ideal aim of the Committee was to establish a sustainable support base for victims”. See Interview with Barbara Watson, Executive Secretary of the RRC (February 12, 2003).

⁵⁷ A. Boraine, *Country Unmasked* (2000) 334.

⁵⁸ *Ibid.* 335.

⁵⁹ *Ibid.* 336

⁶⁰ E. Daly, “Reparations in South Africa: A Cautionary Tale”, p. 6; see also *TRC Report*, Volume 5, Chapter 6

⁶¹ *TRC Report* (1998), Volume 5, Chapter 9

In October 1998, TRC Chairperson Desmond Tutu handed over the five volumes of the TRC Report to President Nelson Mandela, but the final report including two supplementary volumes was not tabled in Parliament until April 2003 (when the amnesty process had been finalised and legal challenges to the report had been resolved). Once Parliament tabled the report, the government could get on with the business of addressing “outstanding and critical issues, the most important of which is reparation for victims”, according to TRC Commissioner Richard Lyster⁶². With the exception of the Urgent Interim Reparations, which were legislated in the TRC Act⁶³ and began in June 1998, the recommendations put forth by the TRC were contingent upon government response.

The RRC recommended the following five categories of reparation⁶⁴:

- Urgent Interim Reparation (UIR) – To assist people in urgent need, to provide them with access to appropriate services and facilities, “it is recommended that limited financial resources be made available to facilitate this access”.⁶⁵ The TRC Act provided that UIR could include medical, emotional, educational, material and symbolic needs. UIR payments began in June 1998. After reviewing applications for UIR, the RRC would determine if the person was a “victim of gross human rights violations” and then make an assessment in order to establish how the violations affect the person, and what help he/she needs.⁶⁶ Victims were given a once-off payment of UIR ranging from R2000–R7500.
- Community Rehabilitation Programmes – To encourage healing and recovery of communities, these reparation measures included national demilitarisation, resettlement of displaced persons, rehabilitation for perpetrators and their families, mental health services and skills training.⁶⁷
- Symbolic Reparation – To restore the dignity of victims and survivors of gross human rights violations and to facilitate the communal processes of commemorating the pain and celebrating the victories of the past, recommended reparation measures included the issuing of death certificates, exhumations, reburials and ceremonies, expunging of criminal records, renaming of streets and “culturally appropriate ceremonies”.⁶⁸
- Institutional Reform – The TRC recommended the adoption of administrative, legal and institutional steps to ensure that the human rights violations would not be repeated.⁶⁹

⁶² See *Cape Times* (January 30, 2003)

⁶³ Promotion of National Unity Act found online at <http://www.gov.za/acts/1997/a84-97.pdf> (1995), Sect. 25(b)(i)

⁶⁴ *Ibid.* Sections 25 – 32.

⁶⁵ *Ibid.*

⁶⁶ Interim Reparation Notification, Department of Justice. See also “Policy Framework for Urgent Interim Reparation Measures”, found online at www.doj.gov.za/trc/reparations/policy.htm, section E, “Operational Issues”: “A person will only be considered for UIR once the person has been formally found to be a victim of gross human rights violation as defined by the [TRC Act] and referred to the RRC by either Amnesty or Human Rights Violations Committee”.

⁶⁷ *TRC Report*, Vol. 5, Chapter 5, Sections 94 - 115

⁶⁸ *Ibid.* Sections 78 – 93.

⁶⁹ *Ibid.* Sections 114 – 115.

- Individual Reparation Grants - The formula chosen to calculate the amount of individual reparation grants was based on three components: an amount to acknowledge suffering; an amount to enable access to service and facilities; and an amount to subsidise daily living costs, taking into account the current economic circumstances of the reparations applicant. Financial grants would range from R17 000 to R23 000 per year over a six-year period. The Final Report calculated the overall expense involved to be R477,400,000 (USD47,740,000) per year or R2,864,400,000 (USD 286,440,000) over six years (based on an estimate of 22,000 eligible victims).

These differentiated set of specific proposals taken together, intended to satisfy the ambitious mandate of the RRC, involved reparation *as justice* (i.e. counter-balance to amnesty), *for reconciliation*, *toward* institutional and systemic reform, in addition to reparation as restitution in the form of individual compensation. With these recommendations, the TRC appears to acknowledge that a token amount of compensation alone to a limited number of victims would not satisfy the broad mandate of the TRC. In the TRC Report, there is recognition that limiting the number of victims meant compensatory programmes would have limited reach when it comes to healing and repairing individuals and families⁷⁰. This is not to imply that symbolic reparation or institutional reform was not important, but they would not have satisfied victims were those proposals to occur without compensation. The symbolic and institutional reparation recommendations were relatively non-controversial and uncontested. The compensatory proposals, on the other hand, were quite controversial and created enough resistance that the government's response was much delayed.

3.1.3. The ANC government response and implementation of reparation

Nearly five years after the TRC in October 1998 first submitted its formal recommendations for a comprehensive reparation programme, President Thabo Mbeki finally announced the government's official position on reparations to a joint sitting of Parliament and the National Council of Provinces in June, 2003. The big question vis-à-vis compensation as part of a broader reparation scheme was: Would the government accept the TRC's recommendation to provide upwards of R120,000 as financial compensation to each of the 22,000 victims?⁷¹ Many victims had already been given Urgent Interim Reparation (UIR)⁷² of R2500 – R7500, paid out by the TRC through the President's Fund. Approximately R44million had been paid out in this way to about 14,000 victims and family members for UIR.⁷³ In his June 2003 public speech to parliament, Mbeki announced that the government would give a once-off payment of R30,000 to each

⁷⁰ TRC Final Report, Volume 6, Section 2, Chapter 1, footnote 7 (March 2003)

⁷¹ Exchange rate of June 16, 2003: US\$1: R7.82. Found online at <http://www.xe.com/ucc/convert.cgi>.

⁷² Those eligible included victims not expected to outlive the Commission as well as those who had "urgent medical, emotional, educational, material and/or symbolic needs". See TRC Report, Vol. 5, Chap. 5, para. 56 (1998). Found online at www.polity.org.za/govdocs/commissions/1998/trc/5chap5.htm

⁷³ C. Colvin, "Overview of the Reparations Programme in South Africa," CSV Report commissioned by ICTJ (2003).

person, or family, designated a “victim” of gross human rights violations (during the time period 1960–1994) by the TRC.⁷⁴ The government also accepted the TRC’s recommendations for the “rehabilitation of communities” and for systematic programmes to “project the symbolism and the ideal of freedom”. These included erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names⁷⁵.

In the context of the expectations for reparation that had been generated by the TRC process, the ANC government’s official response came as a great disappointment, and even more so after the inexplicably long delays in announcing it. While Mbeki was willing to accept some of the TRC’s recommendations, the level and scope of reparation payments amounted to only a fraction of the TRC’s recommendations. Moreover, in doing so, Mbeki made it clear that rather than as “reparation” to individual victims of gross human rights violations, these measures should be seen as part and parcel of an array of government policy initiatives for general social and economic reconstruction and development (e.g., infrastructure and jobs):

An integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.⁷⁶

That this contrasted philosophically with the notion that the TRC – and more specifically, its reparation programme – was instituted for the pursuit of justice, not social reconstruction, was not lost on the human rights organizations, individual victims and certain TRC Commissioners. Indeed, in the final TRC Report, the TRC mentions the argument that individual reparations come at the cost of social reparation “is hardly persuasive: the two are not mutually exclusive within broader budgetary priorities”⁷⁷. Politicians across divides welcomed Mbeki's decision, however, and the divergent interpretations of the TRC process by government officials on the one hand, and by some TRC commissioners and civil society on the other, have brought the entire process into question.

It is worth noting that the government was under significant financial pressure, and the price tag of the TRC recommendations - at R3 billion over six years - were “quite considerable”, according to Vusi Pikoli, Director-General in the Department of Justice and Constitutional Development. Commenting on the government’s rationale, he said that one way of addressing the financial burden was to “move away from and

⁷⁴ Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation, on the occasion of the tabling of the Report of the Truth and Reconciliation Commission, found online at <http://www.gov.za/speeches/index.html> (April 15 2003).

⁷⁵ See TRC Report, Vol. 6, Section 2, Chapter 1 (2003), 95

⁷⁶ *Ibid.*

⁷⁷ TRC Report (2003), Vol 6, Sec 2, Chapter 7, 163

minimize cash payouts, but concentrate on the Rehabilitation, Institutional Reform as well as Symbolic components of reparations."⁷⁸

Mbeki's response may have been disappointing to many victims and human rights organisations, but it was hardly a surprise given his previously expressed public contempt for the TRC process. At the TRC Report's unveiling to Parliament in February 1999, Mbeki offered faint praise and then sharp criticism, alluding to earlier claims that the TRC had been guilty of "artificial even-handedness". After lauding the report for, among other things, "discovery and exposure of the truth with regard to many instances of gross human rights violations ... and identify[ing] some of the people who are entitled to receive reparation", Mbeki sharply criticized the "erroneous logic" that resulted in the characterisation of "all irregular wars of liberation as tantamount to a gross human rights violation"; he concluded: "[The ANC] cannot accept such a conclusion, nor will the millions of people who joined in the struggle to end the system of apartheid."⁷⁹

Mbeki's personal dispositions aside, some observers have remarked that his ANC government, by pointing to institutions of finance, beneficiaries of apartheid, NGOs, churches, community-based organisations as well as international organisations and business, has been "intent on broadening the concept of responsibility for apartheid, thus making it difficult to locate the responsibility for reparations solely with government"⁸⁰. There were even reports of callousness on the part of government officials. According to Makhalemele, in his case study of the Khulumani movement,

Where financial reparations were discussed, the tone of government increasingly and openly showed a lack of sensitivity toward those demanding reparations. Employing opprobrious epithets to describe Khulumani members (such as "sinners", "greedy") and likening them to "mercenaries" who demand money for partaking in the anti-apartheid struggle, government spokespersons had begun to elicit rebukes from many quarters, including Archbishop Desmond Tutu, for their callous attitude.⁸¹

In its official response, the ANC government also took issue with key recommendations by the TRC as to various forms of collective reparation. The TRC had recommended that the business community be assessed a once-off tax that would go toward the President's Fund, the fiduciary body tasked with the responsibility of distributing reparation payments. Victim-support groups, such as Khulumani acting alongside Jubilee South Africa, supported the TRC's recommendation regarding the business community, but the government was not prepared to impose a one-off "wealth tax" on business to fund reparation as suggested by the TRC.

⁷⁸ "The Implementation of the TRC's Recommendations: Where we are in relation to reparations and institutional reforms in the health sector", workshop summary report, CSVr (February 16, 2006)

⁷⁹ Mbeki's claim is rebuffed by Boraine. See A. Boraine (2000), p. 323. Also, du Toit writes that Mbeki's stance against the TRC contradicts the official ANC approach, which was ambivalent but which acknowledged that gross human rights violations had taken place in its armed struggle against apartheid; see also A. Boraine (2000), p. 323.

⁸⁰ O. Makhalemele, "Khulumani Case Study, South African Reconciliation Project, found online at <http://www.csvr.org.za/papers/papoupa2.htm>

⁸¹ Ibid.

This did not bring to an end the victims' movement quest for reparation by the business community. Khulumani and Jubilee South Africa had, in fact, initiated a lawsuit in U.S. courts against South African and American businesses that "aided and abetted the apartheid regime".⁸² Based on common law principles of liability and the U.S. Alien Torts Claims Act, the claimants argued that institutional corporations and banks who refused to acknowledge their complicity in the apartheid regime and did not seek amnesty during the TRC process, "have opened themselves to litigation"⁸³. Mbeki denounced these lawsuits, asserting that the government finds it "completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country".⁸⁴ Mbeki and the ANC were concerned, too, that such lawsuits would discourage foreign investment in South Africa and thus harm the economy.

Mbeki repudiated all attempts towards reparation based on punitive actions and instead stressed the need for a cooperative and voluntary approach to social reconstruction and development. He declared in his 2003 speech that "while government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC".⁸⁵ This indicated a basic shift of political and economic priorities away from victim-oriented and violation-based reparation. Mbeki, like Mandela, has been careful to appease business interests for the sake of social and economic stability in South Africa. A mandatory "tax" on business may have disrupted the prospects of a stable relationship between government and business.

3.1.4. Responses of victims and victim groups

The most active victim support group has been the Khulumani Support Group (KSG). From the onset of the TRC, KSG pressed for the quick implementation of the TRC reparation recommendations⁸⁶. It is important to note that their criticisms were directed at both the TRC and the government. The TRC was criticised for its restrictive interpretation of its official mandate in considering victim eligibility for reparation, as well as for

⁸² *Khulumani et al. v. Barclays et al.* (Cohen, Milstein, Hansfield and Toll, P.L.L.C.), found online at <http://www.cmht.com/casewatch/cases/cwapartheid4.html>; See also "Briefing on the Reparation Lawsuit facilitated by the Apartheid Debt and Reparations Campaign of Jubilee South Africa", Press Release Jubilee South Africa Campaign, (February 21, 2003)

⁸³ Ibid.

⁸⁴ Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation on the occasion of the tabling of the Report of the Truth and Reconciliation Commission, Cape Town, found online at <http://www.gov.za/speeches/index.html> (15 April 2003)

⁸⁵ Ibid.

⁸⁶ See, for example, Khulamani Victim Support Meeting Minutes, found online at http://truth.wvl.wits.ac.za/list_items.php?cat=4.4. (October 19, 1996). See also Report on the Khulumani Reparations Indaba (April 25 – 26, 2001).

its practical management of reparations claims procedures, e.g., the time constraints set for victims to come forth and make statements. There was criticism about the lack of inclusivity and opportunity for effective participation by victims throughout the process⁸⁷. In particular, the Commission was blamed for the fact that some victims had been left out of the process because they missed the deadline or because they were ill-informed about the regulations.⁸⁸ In part, such criticisms reflected the practical difficulties encountered by the Commission, such as that the TRC had trouble locating victims after statements had been made.⁸⁹ Victim advocate, Joyce Seroke, said: "One of the most frustrating aspects is that quite a number of victims who made statements now cannot be traced. People have changed their addresses, especially those who lived in shacks and informal settlements."⁹⁰ However, the criticisms by victims went further than such practical matters. Christopher Colvin, a researcher for the Centre for the Study of Violence and Reconciliation, concluded that victims felt the TRC was biased toward perpetrators. He writes that "victims have frequently raised the objection that both the TRC and the government have been much more interested in placating perpetrators than meeting the needs of victims. In this context, reparations have come to mean much more than a means of support or a kind of recognition of suffering"⁹¹.

Yet another major concern, this one shared by TRC Commissioners⁹², involved the inordinately long delay by the government in implementing a reparation programme from the submission of the RRC's recommendations for reparation with the interim TRC Report in 1998 to the government's eventual response in 2003. TRC Commissioner and deputy Chair of the RRC, Wendy Orr, remarked that "the delay in delivery of reparation, particularly contrasted with the 'immediate delivery' of amnesty, was perhaps the most distressing issue for victims and organisations representing victims."⁹³ Many victims did stress the practical importance of compensation, mainly because they needed it to augment meagre or no income. The delay, along with the disappointingly low amount of final reparations relative to the TRC recommendations, was therefore upsetting for practical reasons. As Duma Khumalo, the Victim Empowerment Manager of Khulumani, wrote in Khulumani's newsletter: "A symbolic stone will not pay my children's school fees or

⁸⁷ Traces of Truth, Introduction to TRC Category: Reparations, found online at http://truth.wvl.wits.ac.za/cat_descr.php?cat=4. See also "Survivors Perceptions of the TRC Report and Suggestions for the Final Report", CSVr and Khulumani, found online at http://truth.wvl.wits.ac.za/list_items.php?cat=4.1 (April 7, 1998).

⁸⁸ "HRV Committee turns away late applications" in *Truth Talk: The Official Newsletter of the Truth and Reconciliation Committee* (1998); and *Report on the Khulumani Reparations Indaba 3*. See also Interview with Lorna Levy, Programme Coordinator CSVr (December 5, 2001) provided to the author by CSVr.

⁸⁹ Ibid. Human Rights Violations Committee member, Joyce Seroke, is quoted as saying: "One of the most frustrating aspects is that quite a number of victims who made statements now cannot be traced. People have changed their addresses, especially those who lived in shacks and informal settlements."

⁹⁰ Ibid.

⁹¹ C. Colvin, "Overview of the Reparations Programme in South Africa," CSVr Report commissioned by ICTJ (2003).

⁹² A. Boraine, *Country Unmasked* (2000) 336.

⁹³ W. Orr, "Reparations delayed is healing retarded", in M. Meredith, *Coming to Terms: South Africa's Search for Truth* (1999) 247.

remove bullets in my body"⁹⁴ (Khumalo, D. 2002). Implicit in this statement is that symbolic reparations won't put individual lives back together after years of suffering. In the years between the TRC Report of 1998 and Mbeki's official statement in 2003 civil society groups such as CSVR and the Institute for Justice and Reconciliation (IJR), in addition to victim support groups such as Khulumani, played an important role in keeping the issue of reparation alive by protesting, conducting reparation workshops with civil society and government officials, and through media to demand an official statement of government policy on reparation. Khulumani provided logistical and moral support to victims as well.⁹⁵

In sum, the critical response of victim groups underscores numerous shortcomings with the TRC reparation program and its process of coming into being. Namely, the TRC's limited power to implement its recommendations fostered a sense of false expectations and charges of a double standard from victims who watched as the amnesty proceedings occurred with greater efficiency and authority. The disconnect between recommendation and implementation created a rift between the government, the TRC, and victim groups. A more realistic link between the Commission and the implementation agencies may have mitigated this tension. With the State, governed by the ANC liberators, now pitted against both the TRC and individual victims of Apartheid (as deemed by the TRC), victims had to go *outside* the government to seek advocacy and support. Whether this significantly eroded political support for the ANC is an interesting, and unlikely, proposition (and not one studied here).

The TRC tackled a large and ambitious mandate that by its very nature was too ambitious to ever be fulfilled. Through the process of victim statement-taking and hearings, the general public became enraptured by the proceedings. The TRC delivered on its promise to provide a limited forum for truth-telling and to recommend to the government proposals for reparation and rehabilitation. The promise that those recommendations would lead to healing and reconciliation at both the individual and societal levels has yet to be realized, according to many victims and their advocates. The mere pursuit of a holistic and comprehensive reparation programme is, however, an important standard for which few countries have reached.

⁹⁴ O. Makhalemele, "Khulumani Case Study, South African Reconciliation Project, found online at <http://www.csvr.org.za/papers/papoupa2.htm>. The direct quote was taken from a personal interview between the author and Duma Khumalo (2002).

⁹⁵ See the website for the Khulumani Support Group found at <http://www.khulumani.net/>.

3.2. Malawi

Since 1992, Malawians have participated in three elections (1994, 1999, 2004), and today some experts believe the country holds good prospects for democratic consolidation.¹ Yet despite notable changes, there are, in the words of Ross and Phiri, “many weeds threatening to choke the freshly sprung democracy before it has sunk its roots”.² Malawi’s transformation to democracy from totalitarianism under the thirty-year rule of Dr. Hastings Banda hinges on improvements in vital social and governmental sectors, including the judiciary, which “has a remarkably low level of human and logistical resources”³; law and order; corruption⁴; human rights; literacy rates; infrastructure in terms of communication and logistics; and HIV/AIDS.⁵ Arguably the most fundamental factor obstructing the progress of democratisation, as well as the prospects for any significant reparation process, is the worsening economic situation.⁶ Modest economic growth is forecast for the coming years and is dependent on the assumption that donor demands to curtail corruption and high “non-essential” spending will be met.⁷

With a long past of repressive governance, Malawi’s contemporary political transformation also hinges upon comprehensive measures aimed at ensuring a human rights culture and healing the wounds of victims. In the last twelve years, Malawi has instituted an Ombudsman’s Office, a Human Rights Commission and an Anti-Corruption Bureau, each established as part of the new constitution (1995). The democratically elected government of 1994, along with advocacy organisations such as the Centre for Human Rights and Rehabilitation (CHRR), also undertook an initiative to compensate victims of human rights abuses that occurred during the long, totalitarian regime of the Dr. Banda. However, progress in implementing the government-sponsored reparation program has been stymied because of a lack of organisational capacity,

¹ M. Ott, K. Phiri and N. Patel (eds.), Malawi’s Second Democratic Elections: Process, Problems and Prospects (2000) 13; and Country Report, The Economist Intelligence Unit (2002) 7.

² K. Phiri and K. Ross, “Introduction: From Totalitarianism to Democracy in Malawi”, in M. Ott, K. Phiri, K. Ross (eds.), Democratisation in Malawi: A Stocktaking (1998) 16. For Ross and Phiri, these “weeds” can be explained as anti-democratic tendencies arising from a century of colonialism and dictatorship.

³ *Ibid.*

⁴ Malawi’s score on Transparency International’s Corruption Perception Index worsened from 2001- 2002 from 3.2 to 2.9. See Country Report, The Economist Intelligence Unit (2002) 20.

⁵ M. Ott, K. Phiri and N. Patel (eds.), Malawi’s Second Democratic Elections: Process, Problems and Prospects (2000) 14 – 16.

⁶ K. Phiri and K. Ross, “Introduction: From Totalitarianism to Democracy in Malawi”, in M. Ott, K. Phiri, K. Ross (eds.), Democratisation in Malawi: A Stocktaking (1998) 14. According to Economist Intelligence Unit, Country Report on Malawi (2002) 5, GDP per capita is a mere US\$170, while inflation hovers between 16 – 19%. Agricultural development, which accounts for over 50% of GDP, has experienced significant loss in recent years due to poor maize harvests, while industrial production fell by 14%, according to the Economic Report: May - June 2002, The National Economic Council of Malawi, found online at <http://www.malawi.gov.mw/finance/nec/nec.htm>

⁷ Country Report, The Economist Intelligence Unit (2002) 8 – 21. “Non-essentials” include excessive severance packages and parastatal employment

lack of funds and the government's unwillingness to "fully acknowledge and address the plight of the victims".⁸

Malawi's programme to provide reparation (i.e., compensation) to victims of human rights violations from mass political oppression and violence, the National Compensation Tribunal (NCT), which has been in existence since 1995, operates within the above social, economic and political constraints. Despite pressure from victims and members of non-governmental organizations, the government opted not to establish the NCT as part of a comprehensive process of transitional justice. In Malawi, there has been no systemic approach to truth-telling or investigation.

3.2.1. Historical Background of Gross Human Rights Violations

Malawi achieved independence in the early 1960's after seventy-three years of British rule, during which the country was known as Nyasaland. This marked the first political transition, though not quite to democracy, in Malawi's recent past. The achievement of independence was followed by thirty years of abusive rule by Dr. Hastings Kamuzu Banda and his Malawi Congress Party (MCP). Hundreds of thousands of innocent civilians were victims of human rights violations during Banda's rule⁹. In the early 1990s, a second political transition occurred. The second transition, beginning in 1992, was incited largely by forces inside Malawi, namely the Catholic and Protestant Churches and politically active exiles, and culminated in the peaceful ousting through democratic means of Dr. Banda and the election in 1994 of former MCP Secretary General, Bakili Muluzi, who was the leader of the main opposition party, the United Democratic Front (UDF).

While violations of human rights of Malawians certainly occurred under British rule prior to 1964,¹⁰ it is the timeframe of Banda's regime, 1964 – 1994 that dominated the debate on redress for victims and national truth telling. This is due, in large part, to the nature of the political changeover: Muluzi's party, the UDF, sought retribution and recognition of wrong doing by its political nemesis, the MCP; many in the new government, including Mr. Muluzi, had been victims under Banda and stood to benefit, both economically and psychologically, from a compensation program to be instituted by the new government.

⁸ Case Study: Centre for Human Rights and Rehabilitation – Torture Victim Project, 2 – 4. Provided to the author by CSV.R.

⁹ Estimates place the number of victims of human rights abuses, including, but not limited to disappearances, unlawful detention, religious and political persecution, and torture, at 250,000 at the height of Banda's "reign of terror". See SARP Malawi Country Report: The Process of Transition and Reconciliation 17.

¹⁰ For example, in March 1959, the British Governor of Malawi Sir Robert Armitage felt so threatened by the liberation struggle that he declared a state of emergency, banned the African Nyasaland Congress and detained more than 1000 Party Leaders including Dr. Banda. See SARP Country Report on Malawi (February 2003) 12. Provided to the author by CSV.R.

The Banda years are described as years of grave suffering, pervasive fear and censorship, and “dull uniformity that criminalized difference - all was contaminated by this naked, arbitrary power”.¹¹ State brutality was usually enforced by three groups: the police (including a paramilitary force and a powerful security branch with an extensive spy network), the Malawi Young Pioneers (MYP) and the MCP Youth League. Many people disappeared mysteriously and “everyone feared the dreadful fate of becoming food for the crocodiles of the Shire River”.¹² Those persecuted for political or religious reasons suffered in dilapidated prisons or through coerced forfeiture of homes and property. In some cases, prison sentences upward of thirty years were imposed upon political detainees. The threat of abuse, disappearance or murder resulted in many fleeing with their families across the border or further abroad. In all, it has been estimated that 250,000–500,000 people were victimised during Banda’s thirty-year rule.¹³

3.2.2. Transitional Justice Context and Claims for Reparation

A Presidential Committee on Dialogue (PCD) guided the formal transitional process, 1990 - 1994. Working in collaboration with the Public Affairs Committee of the Protestant Churches (PAC), the PCD established the National Electoral Commission (NEC), the National Consultative Council (NCC) and the Constitutional Drafting Committee (CDC). These were comprised mainly of government officials and representatives of political movements, with the participation of a smattering of businessmen and traditional leaders as well. Prominent exiled business people and politicians played a role as catalysts for political change. Ordinary citizens, including many of the rural poor who were victimised during the Banda years, did not contribute substantially in the negotiation process¹⁴. The NCC subcommittee charged with writing the new Constitution was primarily responsible for developing proposals for the form and function of the National Compensation Tribunal. Foreign advisors from the UK shared experiences of the UK Foreign Compensation Commission, and representatives of Legal Aid clarified issues important to victims.¹⁵

Reforms taking place concurrently in South Africa influenced Malawi’s process, and one view was that attempts at reparation in Malawi should be modelled on South Africa’s Truth and Reconciliation Commission (TRC). A truth commission would have given voice to victims - “the screams of tortured

¹¹ P.T. Zeleza, “Totalitarian Power and Censorship in Malawi”, *Southern African Political and Economic Monthly* (August 1995) 33, quoted in *SARP Country Report on Malawi* (February 2003) 4.

¹² *SARP Country Report on Malawi* (February 2003) 15.

¹³ K. Ross, “Does Malawi still need a Truth Commission”, in M. Ott, K. Phiri, K. Ross (eds.), *Democratisation in Malawi: A Stocktaking* (1998) 336-354. He cites a March 19, 1996 session of Parliament when Mr. Y.A. Lambat, MP for Blantyre Rural East, made the claim, “speaking on the authority of Amnesty International”.

¹⁴ Interview with George Kanyana, exiled during the Banda years and then elected Minister in the Ministry of Relief and Disaster Preparedness (June 2002). Provided to the author by CSV.

¹⁵ D. Cammack and C. Mwale, “Reparations in Malawi, 1992 – 2001” (2003) 13.

Malawians need to be heard”, writes Ross¹⁶. A truth process would confront national moral and criminal guilt and “bring out those aspects of the past which have to be rejected” for future Malawians.¹⁷ Exposing the brutality of the Banda regime and grappling with it in a public forum would help all Malawians, particularly those suffering tangibly from the past political repression. However, the NCC rejected the idea of a truth commission, primarily out of fear that such an institution would point blame at individuals of the new political dispensation, since most of the new political parties included members of the former regime. Even the current President Muluzi once played a prominent role in the former regime. The mechanism for reparation would be compensation, through a state-sponsored Tribunal (the NCT), which in itself was meant to symbolise acknowledgement of wrongdoing and therefore to foster reconciliation.

According to a participant in the transitional government, “the idea of reparation may have symbolized a form of reconciliation – that people can say that at least they have gotten something out of their suffering and they can start their lives fresh again.”¹⁸ In contrast, some victims expressed a desire for the NCT to address the underlying problems existing in a post-Banda Malawi and to facilitate a holistic approach to reparations and accountability. The feeling was that the new government’s response demonstrated “reparation” as a top-down process involving victims and the new government, with no apparent consequence for perpetrators. Moreover, what was actually delivered by the NCT fell far short of the returnees’ and victims’ expectations, so that “the attainment of reconciliation has been severely inhibited”.¹⁹

Reparation *as compensation* was nonetheless considered politically important for at least three reasons. First, the government determined that it was necessary to provide compensation to victims of *Operation Bwezani*. *Operation Bwezani* had been a three-day, victorious assault on the Malawi Youth League (MYP) in early December 1993. Though claimed to have been a good-faith effort by the new government to rid Malawi of the MYP, it immobilised the country and resulted in numerous injuries and 31 dead. Second, compensation for returnees and ex-detainees was a way to shore up political support for the various political parties vying for power. The return of the political elite followed the passage of the General Amnesty Act²⁰, which immunized political exiles and made it “imperative” to create a constitutional body to deal with compensation for those who had fallen victim to the Banda regime.²¹ An early amendment to the General Amnesty Act obligated the government to establish and examine arrangements for the return, reception, resettlement and, as necessary, rehabilitation of returnees. The idea of a compensation tribunal, to be

¹⁶ Cited in K. Ross, “Does Malawi still need a Truth Commission”, in M. Ott, K. Phiri and K. Ross (eds.), *Democratisation in Malawi: A Stocktaking* (1998) 336.

¹⁷ *Ibid.* 347.

¹⁸ Interview with George Kanyana by Jewel and Martin (last names withheld) (June 25 2002).

¹⁹ *SARP Country Report on Malawi* 26.

²⁰ General Amnesty Bill no. 16 of 1993, passed 23rd (June 1993). See *SARP Country Report* 25.

²¹ *SARP Country Report on Malawi* (February 2003) 12.

administered through the Department of Relief and Rehabilitation, was born out of this governmental obligation.

Diane Cammack elaborates on the politics of the reparation discussion and the diversity of opinions regarding the reparation question:

... the UFMD – a party composed of mostly exiles – was keen to obtain help for repatriation and compensation for the murder and exile of family and friends. Most AFORD members were anxious to gain compensation for exiles though some were also quite interested in excavating the past. Members of the MDP were adamant that compensation was insufficient – the truth must be known and names should be named. Naturally, the MCP was most unwilling to rake up the past and argued against compensation – or at least made others aware of the cost to the government. Most importantly, the UDF leaders spoke with conflicting voices – many were anxious to see compensation awarded to victims, while fewer were willing to open up the past in any detail.²²

Arguably, the most influential reason for the development of a state-sponsored reparation scheme was the preponderance – and threat of proliferation – of civil cases brought against the Malawi government on behalf of victims. One landmark judgment stands out. In early 1993, Machipisa Munthali was awarded K4.5 million in damages through the High Court for being illegally detained by the government for 27 years. Munthali's case, along with several dozen others resulting in damages awarded ranging from K40,000 into the millions, prompted a precipitous increase in High Court cases. The number of Court cases subsided in 1995 with the adoption of the new Constitution, which assigned sole jurisdiction to the NCT for civil claims by victims of human rights abuses. This has led to suspicion that the exclusive jurisdiction clause was designed to prevent people from winning large settlements. Munthali, for one, revealed: "suspicion is that the NCT was established in part to prevent others from launching a civil suit against the government, as I did".²³

3.2.2.1 National Compensation Tribunal: Objectives, Means, and Claims Process

The National Compensation Tribunal (NCT) derived its mandate from Chapter XII of the Malawi Constitution, passed in 1995²⁴. The objectives of the NCT include:

- To acknowledge the wrongdoing of the previous government (1964 – 1994), as recognised in the Constitution, whether of a civil or criminal nature;
- To extend an apology, an olive branch, to acknowledge the hardship and suffering endured by those who were wronged;

²² D. Cammack and C. Mwale, "Reparations in Malawi, 1992 – 2001" (unpublished ICTJ report).

²³ Interview with Matchipisa Munthali conducted by Jewel and Martin (May 3 2002).

²⁴ Constitution of the Republic of Malawi, found online at www.sdn.org.mw/constitut/intro.html

- To offer compensation in different forms – monetary, other material support, or symbolic acknowledgement of wrongdoing²⁵.

Victims who were eligible for compensation from the NCT were Malawians “who, on political grounds between 6th July 1964 and 17th of May 1994, were wrongfully imprisoned, forced into exile, personally injured, lost property or business, lost education opportunities, lost employment benefits and those who were born in exile or detention”.²⁶ Victims or their lawyers could make a claim directly to the NCT. Each claimant received a number, which was supposed to determine the order of processing and payment. The requirements for making a claim were not cumbersome, but the compensation scheme was complicated and made more difficult by the large number of claimants (i.e., over 20,000) and the weak infrastructure to process the claims. According to one observer, the Tribunal had no definite formula for assessing non-pecuniary loss: “The general principle was guided by precedents, economic factors and the general policy of the NCT which was that awards of compensation by the Tribunal would be lower than those given by the High Court and shall follow a tradition of condolence.”²⁷

The claims process occurred in the following manner: After providing positive “proof of victimisation”, claimants were told how much compensation they could expect to receive. Acceptable proof of victimization included: detention order, letter from the police, letter from the prison, dismissal letter from employer, dismissal letter from school, refugee identity card, letter from UNHCR, cash sales receipt (to demonstrate purchases in exile), vehicle registration book, letter from Ministry of Relief and Rehabilitation, medical report, prison discharge certificate and so forth.²⁸

Compensation amounts depended on the type of claim. There were more than a handful of categories of claims, each with a corresponding payment scheme. Categories of claims and corresponding compensation included “forced exile claims” (between K10,000 – K20,000²⁹ depending on length of exile), “loss of property claims” (between K500 for loss of poultry to K50,000 for loss of a home), “wrongful imprisonment claims” (between K10,000 and K20,000, depending on the length of incarceration), and “claims of loss of life” (K20,000 payable to the dependent).³⁰ Interim payments would be made immediately (in up to two

²⁵ SARP Case Study, 4.

²⁶ *Ibid.*

²⁷ In the tradition of condolence in Malawi, money is given as a symbolic gesture that someone is sorry. In the spirit of “the thought that counts”, the amount does not matter as much as the gesture. See SARP Case Study 10.

²⁸ See SARP Case Study, pp. 5 – 6.

²⁹ Exchange rate of June 16, 2003: \$1: K88.5 (US\$:Kwacha). Found online at <http://www.xe.com/ucc/convert.cgi>.

³⁰ These statistics were drawn from Understanding the Past to Safeguard the Future 35-36; Minutes of the 5th Roundtable Meeting, National Compensation Tribunal; ‘Workshop No. 4: Paper Guidelines and Recommendations’ (Sept 29 2000); ‘Report of the Barker Mission’ (May 1 1997); and GOM/European Development Fund, Promotion of the Rule of Law and Improvement of Justice Programme. Annual Report 2001: NCT Track Record.

weeks) after a claim had been made, and final payments were to be made months later, once decided by the Tribunal.

3.2.2.2. Key Issues and Concerns with the NCT

By 2002, the NCT has processed more than 23,000³¹ claims since its founding, but there were “potentially thousands” more to be processed, according to Chief Administrator Hombe.³² The administration of funds was very slow. Claimants are known to have applied for compensation in 1995, yet received interim payment only in 1999.³³ Only 7000 people³⁴ have been given interim payments, ranging from K10,000 to K20,000, while only 500 final payments have been made. Estimates of the total amount of compensation to be paid totalled K24 billion (in 2003), or several times the amount that the Government could contribute from the Treasury³⁵. The NCT is dependent entirely on the government for funds. Attempts to raise funds from donors have instead resulted in funding for technical support or training. Donors did not want to give money for direct compensation because they feel that such payments would not encourage the government to maintain a clean human rights record³⁶.

While the lack of funding is a serious problem, there are other alleged deficiencies with the system, according to NCT administrators and a select number of claimants whose statements were provided to the author by the Centre for the Study of Violence and Reconciliation in Cape Town, South Africa. These statements are uncorroborated, but offer a unique perspective into the shortcomings of the NCT. With interim payments slow in coming and the promise of final payments arguably a mirage, there is a feeling that the NCT is not accomplishing what it was intended to accomplish. The administration of funds is “frustratingly slow”, according to Chief Administrator Khombe³⁷. Moreover, dissatisfaction with the low monetary value of interim awards is common. One victim lamented: “I felt that K20,000 bore absolutely no relation – interim or otherwise, to what I had gone through”³⁸. Another victim added: “If you look at the human tragedy of both detention and political exile, the reparations that have accrued are a mockery of the whole system”.³⁹ The lack of personal attention and the insensitivity to victims during the process is another concern. Victims whose statements were compiled for this case study complained of being shuffled in and out of the proceedings, where they are given “a minute or so” to explain their case. One claimant had a

³¹ Interview with NCT Chief Administrator, Mr. HS Khombe (25 February 2002).

³² Ibid.

³³ Interview with John Soo Phiri conducted by Jewel and Martin (June 6 2002).

³⁴ Newspaper reports indicate that only 7000 (35%) of the 23,600 people who registered with the NCT have benefited.

See *The Nation* (June 13 2002) 3.

³⁵ D. Cammack and C. Mwale, “Reparations in Malawi, 1992 – 2001” (2003) 2

³⁶ Interview with NCT Chief Administrator, Mr. HS Khombe (25 February 2002).

³⁷ Ibid.

³⁸ Interview with George Kanyana by Jewel Amoah and Martin Nkuna (25 June 2002, Lilongwe).

³⁹ Interview with Mr. Kapote Mwakasungula conducted by Jewel and Martin (May 1 2002).

problem “with the manner in which the whole thing was handled ... this should not have been a routine office matter. There should have been a hearing – something that would have given me, as the victim, the right to be heard, to explain what happened, to shed tears if I so desired.”⁴⁰

In addition, claims of bias in favour of the political elite are evident; according to a few claimants, well-connected individuals benefited substantially from the NCT prior to 1997. Although the system was set up to work on a first-come-first served basis, application numbers were often interchanged to benefit certain individuals.⁴¹ The charges of corruption are substantiated by comments from NCT insiders. The NCT Chairperson, Justice Isaac Mtambo, disclosed: “Money had been sent to the tribunal with specific instructions to pay [a] certain ex-Minister”⁴². Justice Mtambo refused however to meet this demand, “as this was not [his] role”⁴³. These observers believe there is a correlation between the sharp decline in funds made available to the NCT over the last few years and the relative ease with which the politically-connected initially received compensation. The NCT chairperson said: “There was a rush in the beginning, but now they are not giving us the money. They have dumped us, as if to say, we have gotten what we want and don’t care anymore.”⁴⁴

Despite having investigative duties derived from law, the NCT, hampered by a shortage of staff, has had to rely disproportionately on testimony of the victims as the basis for giving (or not giving) compensation, rather than on supplementary, independent investigative findings. However, some victims have complained of difficulty in producing the necessary evidence required to receive compensation. One claimant explained that in trying to track down records from the police and the Ombudsman, he “felt as though he was being thrown from pillar to post”.⁴⁵ Another person discussed the consequences of this poor access to the Tribunal on his parents: “My mother was detained and we never managed to get any official documentation as proof. The situation was aggravated by the fact that prison authorities are very difficult. My father-in-law was also detained but the question of getting documentation has proved elusive and he has not been compensated.”⁴⁶

One objective of the NCT was to create a forum for public discussion of the wrongdoing that occurred in the past. A structure was set up for the NCT to facilitate such discussions, but criticism over the lack of publicity, lack of public or civic education about the NCT, and the refusal to list names of victims or perpetrators indicates the NCT’s inability to meet those expectations. The current chairperson reveals the limited scope of the public relations campaign, when he revealed that the Tribunal made names of claimants

⁴⁰ Interview with Dr. Edge Kanyangolo by Jewel and Martin (February 15 2002).

⁴¹ Interview with NCT Chairperson, Justice Isaac Mtambo (February 25 2002).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Interview with Dr. Edge Kanyangolo by Jewel and Martin (February 15 2002).

⁴⁶ Interview with Mr. Kapote Mwakasungula conducted by Jewel and Martin (May 1 2002).

public “by pasting announcements on the bulletin outside the NCT offices, but they had stopped doing it because of lack of logistical support.”⁴⁷ “There is not much publicity on the issue,” he said, “so the nation really doesn’t know what has been achieved in terms of reparations.”⁴⁸

The fact that many of the victims were ordinary Malawians from rural, poor and illiterate circumstances complicated the process of developing and implementing a compensation scheme. As Dr. Kanyangolo, a former detainee, explained: “The vast majority of people who were victimised were not well-known or elite but the lesser known in villages that may have said something against the government and were taken quietly in the middle of the night. Many of these people and their families may not even be aware of the fact that there is a new Constitution”.⁴⁹ Another complication was difficulty differentiating between two general groups of emigrants who applied for compensation: firstly, those who went abroad of their own volition and then became involved in the political struggle, and secondly those who went into exile because of political oppression. The NCT was charged with addressing the needs of the latter, but ended up servicing some “victims” in the former category. Among those individuals that were victimised within the country there has been resentment regarding compensation to returnees who were victims while in exile; the former has accused the latter of “choking on the national cake without having contributed anything towards it”.⁵⁰

Concerns with the NCT from victims and administrators thus generally fall into four categories: lack of funding, ineffective implementation, an impersonal and corrupt process and lack of public awareness. There is also a disjuncture between the government’s expectations of the compensation tribunal and victim aspirations in terms of reparation. The inability to provide victims compensation, accountability or an apology has given rise to bitterness, according to George Kanyana: “the bitterness that comes from the lack of reparations is what is preventing the whole country from being reconciled itself with the past – once people are paid then maybe things will be different.”⁵¹ However, in Malawi, the issue is not simply financial. The inadequacy of funding could be overcome if there was political will, and moreover that the process of providing compensation – even if token – could have been more victim friendly.

The decision by the transitional government to implement a compensation scheme that was not part of a comprehensive approach to transitional justice that included truth telling and symbolic or institutional reparation has had important consequences. The three-prong mandate of the NCT, which included compensation along with “acknowledgement” and “apology”, was not fulfilled by a system that was under-

⁴⁷ Interview with NCT Chairperson, Justice Isaac Mtambo, by the authors (February 25 2002).

⁴⁸ Ibid.

⁴⁹ Interview with Dr. Edge Kanyangolo by Jewel and Martin (February 15 2002).

⁵⁰ Interview with Mr. Kapote Mwakasungula, former Secretary of United Front for Multi-Party Democracy (UFMD) and member to the NCC (May 1 2002). Provided to the author by CSV.

⁵¹ Interview with George Kanyana by Jewel and Martin (June 25 2002).

resourced, under-staffed and unrepresentative of victims. The credibility of the NCT was eroded as the compensation program became more and more delayed and the charges of corruption within the system became more frequent. In this case, a comprehensive reparation program, as opposed to an inadequate compensation scheme, may have given the new regime more credibility not *in spite of*, but rather *because*, many of the new political parties included members of the former regime. The limited compensation process leads legal professor Edge Kanyangolo to suggest that Malawi has had a “transition, not a transformation”.⁵²

University of Cape Town

⁵² Interview with Dr. Edge Kanyangolo by Jewel and Martin (February 15 2002).

3.3. Zimbabwe

Zimbabwe has a long history of state-sponsored political violence resulting in scores of victims and survivors of human rights abuses and followed, usually, by impunity or amnesty for wrongdoers.¹ Over the last three decades, in particular, hundreds of thousands of Zimbabwean citizens have been victims of political violence and human rights abuses.² There are four well-documented time periods during which government-sponsored mass violence and human rights abuses occurred that are usually the focus of discussions about reparation: the War of Liberation (the 1970s), the Matabeleland and Midlands Uprisings (1983–1987), the Food Riots (1998) and the 2000 Elections. In addition, present-day Zimbabwe is wracked by well-publicised government abuse, most often followed by amnesty for perpetrators.³ Despite the wide-scale victimization, there has been little government-sponsored programmes for reparation. The most tangible has been the War Victims Compensation Act of 1980, established to provide compensation to victims of the War of Liberation.

The issue of reparation as a mechanism of transitional justice in the Zimbabwean context has been raised by advocacy groups such as the Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ) and Amani Trust on two levels, one retrospective, and one forward-looking. There is a push to amend the War Victims Compensation Act (1980) to ensure reparation (e.g., compensation and rehabilitation) for “secondary” victims (families, spouses or children) of war crimes during the liberation struggle leading up to independence and for survivors of torture and genocide during the Matabeleland crisis (1983-87). With regard to forward-looking programmes, there is a fledgling campaign to develop a system for reparation designed broadly for victims of recent human rights abuses that would be implemented in a post-Mugabe Zimbabwe. Yet with respect to a comprehensive reparation programme, the current government has chosen a path of avoidance and denial.

3.3.1. Historical Background of Gross Human Rights Violations

Political repression involving gross human rights violations began well before the War of Liberation in the 1970's. The takeover of Zimbabwe by European settlers at the end of the 19th century “was accompanied by

¹ SARP Country Report on Zimbabwe: Overview of Human Rights Situation (February 2002); and A.P. Reeler, “Can you have a reparations policy without justice”, VIIIth International Symposium on Torture (September 1999) 1.

² “Reparation: Every Torture Survivor’s Right: Invitation to a Workshop”, Amani Trust (date unknown).

³ One of the most “unfortunate” individual cases, according to Mike Auret, former director of the Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ) and now an opposition MP, “was Kombayi who was shot by government and party officials. It took five years to get them to court, they were sentenced to seven years, granted a presidential pardon and one of those men is now occupying a farm, threatening the owner and saying ‘I shot Kombayi several times, I do not mind shooting you, I will get a presidential pardon’”. Interview with Mike Auret by Richard Bischoff (2002).

gross human rights violations committed with impunity on the part of the settlers”⁴. On top of this, Ian Smith’s 15-year rule of Rhodesia, which began in 1965 with a Unilateral Declaration of Independence from Britain and ended in late-1979, was also marked by intense political repression. Independence from white-minority rule was secured in 1980 after a fierce liberation struggle between Ian Smith’s Rhodesian Front (RF) and a coalition made up of two armies from opposition political parties: ZANLA, allied to the Zimbabwe African National Union (ZANU), and ZIPRA, allied to the Zimbabwe African People’s Union (ZAPU). The War of Liberation between Smith’s RF government and black liberation movement soldiers is the object of the only government legislation concerning reparation (as compensation) to date.

The War of Liberation lasted most of the 1970s and resulted in loss of life for probably 30,000 people.⁵ The destruction and trauma of that war, both in terms of casualties and human rights violations to soldiers and civilians, is well documented. The Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ) published the most comprehensive reports in the mid-1970s.⁶ In sum, the reports revealed widespread abuse of civilians, through beatings, suspensions, torture, arbitrary killings and so on. The main culprits were government security forces, which terrorised whole villages suspected of supporting ZANLA/ZIPRA forces by imposing curfews, restricting movement and meting out harsh punishment (e.g., rape, torture and murder).

The infamous Indemnity and Compensation Act of 1975 (with retroactive application to 1972) gave impunity to security forces and blatantly excused their killing and maiming sprees. The key provision of the Act, writes Huyse, “was granting indemnity in advance: it proclaimed that members of the army, the police, the Central Intelligence Organization, the government or the civil service who had committed crimes “in good faith” could not be prosecuted.”⁷ Civilians and war veterans were also victimised as a result of ZANLA and ZIPRA reprisals (as well as in-fighting between the two): “Ordinary people living in the rural areas were caught in the middle of the conflict and suffered in many ways. They were punished by the Rhodesians if they helped the freedom fighters, and punished by the freedom fighters if they would not help them.”⁸

In research conducted in the Mount Darwin district, Reeler estimates a “very conservative” figure of 50,000 primary victims (and as many as 4 or 5 times more secondary victims) of the Liberation War alone. Victims were civilians as well as soldiers. The effects of this victimization linger on. A 1997 study detailing the consequences of torture and organised violence during the Liberation war proposed five broad categories of

⁴ SARP Country Report on Zimbabwe: Overview of Human Rights Situation (February 2002) 1 – 2. Provided to the author by CSV.

⁵ “Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and Midlands, 1980 – 1988: Summary Report” (April 1999) 1.

⁶ Two examples of their publications are *Man in the Middle* (1975) and *The Civil War in Rhodesia* (1976).

⁷ L. Huyse, “Zimbabwe: Why Reconciliation Failed”, in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook* (2003) 35

⁸ “Breaking the Silence, Building True Peace” (April 1999) 1.

victimization: war injured, torture survivors, witnesses of war injury or death and torture, families of torture survivors, and families of disappeared persons.⁹

Independence in 1980 brought freedom from white-minority rule, but it did not bring political stability. The ruling ZANU-PF feared destabilisation from the South African apartheid government and uprisings from an embittered rival, ZAPU, and ZAPU's armed wing, ZIPRA. ZANU-PF thus sought to put down, quickly and harshly, alleged attempts by ZIPRA soldiers (known as "dissidents") to overthrow the ZANU government or to undermine its support. To achieve these ends, ZANU-PF employed extreme measures, carried out by government forces and a militant ZANU-PF Youth wing. The CCPZ and the Legal Resources Foundation (LRC) have concluded that both factions targeted civilians; yet, the infamous, North Korean-trained 5th Brigade employed by the Government perpetrated by far the most human rights violations. An Amani Trust report describes savage activities by the 5th Brigade:

The 5th Brigade behaved in a way that shows it had clearly been trained to target civilians. Wherever troops went, they would routinely round up dozens, or even hundreds, of civilians and march them at gunpoint to a central place, like a school or borehole. There they would be forced to sing Shona songs praising ZANU-PF, at the same time being beaten with sticks. These gatherings usually ended with public executions. Those killed could be ex-ZIPRAS, ZAPU officials, or anybody chosen at random, including women¹⁰.

South Africa complicated matters by extending its policy of destabilising black-ruled countries in Southern Africa to Zimbabwe. Destabilizing neighbouring black-ruled countries would indirectly increase South Africa's external credibility while curtailing the threats from the liberation forces who were seeking to establish bases in these adjacent territories. South Africa intervened militarily on occasion, and its efforts to make ZAPU and ZANU-PF suspicious of one another through use of double agents effectively exacerbated the internecine violence. The political tension and its resulting violence eased with the signing of The Unity Accord in December 1987 between President Robert Mugabe and the leader of ZAPU, Joshua Nkomo. In April 1988, the ZANU-PF government announced amnesty for all "dissidents", 122 of whom surrendered, and in June of the same year the amnesty was extended to include all members of the security forces who had committed human rights violations. In the name of unity and reconciliation the political atrocities in the newly independent Zimbabwe were thus officially forgotten, while the perpetrators on all sides effectively enjoyed impunity.

⁹ Amani Trust (1997), Report on Psychological Disorders in Clinics and Hospitals in Mount Darwin District, Mashonaland Central Province, Harare: AMANI.

¹⁰ Ibid, 9.

In 1997, the CCJPZ and the LRC published a widely-circulated book¹¹, Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands, 1980 – 1988¹², which detailed severe human rights violations resulting from the violent clashes between government forces and “dissidents”, occurring over a seven-year period during the 1980s in the Matabeleland and Midlands Provinces. Their report concludes that over 7,000 people were victimised during that time; approximately 1,400 died, 350 went missing, 680 lost property, 366 were tortured, 1,500 assaulted, 2,700 wrongfully detained, and 159 raped.¹³ Due in large part to the passage of the amnesty law, there is today no substantial legal recourse for victims to claim redress for harms done. There have been at least two government-sponsored commissions of inquiry, including one established in 1985 and presided over by a Zimbabwean lawyer to investigate the killing of an estimated 1,500 political dissidents and other civilians in the Matabeleland region, but none of the reports has been made public.¹⁴

3.3.2. Context of Transitional Justice and Claims for Reparation

Following more than a decade of the Liberation War, international pressure from the United States and the UK had led to the convening of the Lancaster House constitutional conference in 1979 to broker the peaceful transfer of power from white-minority rule to black-majority rule. The Lancaster House conference gave birth to modern-day Zimbabwe and resulted in a constitution based on majority rule. Notably, the constitution called for compensation to war victims (it never uses the term reparation), but also enshrined amnesty. In accordance with the Lancaster House Agreement, Lord Soames, the British Governor for the transitional period, passed the Amnesty Ordinance of 1979 and another General Amnesty Ordinance in 1980, pardoning both sides of the liberation war¹⁵.

The War Victims Act is considered a “political compromise” emerging from the Lancaster negotiations. The War Victims Act coincided with the passage of the Amnesty Ordinance of 1979¹⁶, which exempted from criminal liability acts done in good faith before March 1980 by persons fighting on both sides during the

¹¹ A copy was even sent to President Mugabe, but as of April 1999, there has been no official comment about the report from the President or from the Government.

¹² “Breaking the Silence, Building True Peace” (1999).

¹³ Ibid. 31.

¹⁴ P. Hayner, “Fifteen Truth Commissions—1974 to 1994: A Comparative Study,” *Human Rights Quarterly*, v. 16, no. 4, November 1994, pp. 597-655. Citation found online at US Institute of Peace, <http://www.usip.org/library/truth.html#zimbabwe>.

¹⁵ L. Huyse, “Zimbabwe: Why Reconciliation Failed”, in D. Bloomfield, T. Barnes and L. Huyse (eds.), Reconciliation After Violent Conflict: A Handbook (2003) 36.

¹⁶ British Governor, Lord Soames, who had resumed control of the territory granted two amnesties in 1979, Ordinance 3/1979 (date of commencement 21 December 1979) and Ordinance 12/1980 (date of commencement 21 March 1980). These became the Amnesty Act [Chapter 9:02] and the Amnesty (General Pardon) Act [Chapter 9:03] respectively. This citation found in a REDRESS study of Zimbabwe (date unknown), online at <http://redress.org/studies/Zimbabwe.pdf>

liberation war. Mugabe's policy of "reconciliation" between whites and blacks was necessary to ensure both political stability and economic growth. According to Huyse, "political and economic considerations lay at the heart of the willingness of the liberation movement's leaders to accept and initially respect the peace agreement"¹⁷. While the US and UK were putting significant pressure on black negotiators through unwritten promises of economic support after liberation, the economic reality was that the new black government needed to keep the white, educated labour force inside the country to grow the economy. Mugabe is further blamed for failing to promote "inter-black reconciliation" across ethnic, regional and political lines. Ethnic and political conflict between the majority Shona and minority Ndebele dates back at least to 1966, while the liberation struggle witnessed political strife between political groups (i.e., ZANU versus ZAPU) based on regional and ethnic lines, with ZANU garnering support in Shona-dominated areas and ZAPU in the North and South Matabeleland (mainly Ndebele speaking areas).¹⁸

The politics of pragmatism and "reconciliation" in post-Independence Zimbabwe does not forgive what some commentators believe is a failed policy. According to Reeler, "reconciliation," in effect, meant, "forgiving the torturers and murderers"; he writes further: "We needed to repair ourselves in 1980 but chose reconciliation rather than reparation. It was convenient to do so, and we sweetened the blow with a poor attempt at compensation."¹⁹ Others have suggested that the "white heirs of the Rhodesian regime and the black leaders preferred to impose a shallow, cheap form of reconciliation without historic, restorative or economic justice".²⁰

The new constitution granted white Zimbabweans 20 seats out of 100 in the first parliament and, even more important, "a strict and detailed protection of commercial farmland".²¹ The successor government assumed responsibility for compensation of war-time injuries and let perpetrators go unpunished, since holding the Rhodesian Front forces and the black liberation soldiers accountable would have destabilised the peaceful transfer of power. Huyse contends that the political and economic elite imposed Zimbabwe's post-colonial policy of reconciliation from the top down. He writes, "victims and survivors were not consulted, but rather watched powerlessly as many perpetrators of human rights violations went unpunished and even took on key roles in the Army."²² Huyse ascertains the Mugabe Policy of Reconciliation "was from the very beginning

¹⁷ Ibid., 35

¹⁸ Ibid. 35 - 37.

¹⁹ A. Reeler, "Can you have reparations policy without justice?", VIIIth International Symposium on Torture: Torture as a Challenge to the Health, Legal and Other Professions, (September 1999) 8.

²⁰ L. Huyse, "Zimbabwe: Why Reconciliation Failed", in D. Bloomfield, T. Barnes and L. Huyse (eds.), Reconciliation After Violent Conflict: A Handbook (2003) 39.

²¹ Ibid.

²² Ibid. 37.

built on sand: it was almost exclusively based on political and economic imperatives [and] weakened by the triple culture of amnesia, impunity and contentment (or easy satisfaction).²³

3.3.2.1. War Victims Compensation Act: Objectives, Means and Process

The War Victims Compensation Act was crafted in about three days. The Act was enacted specifically to “provide the payment of compensation in respect of injuries or death of persons caused by the war”.²⁴ The drafters, mostly lawyers, devised a scheme such that compensation was to be provided for physical disability or death, to civilians and soldiers, who suffered damages during the period of 1972 - 1980; psychological trauma was not mentioned, nor was torture.²⁵ Victims who suffered in the subsequent Midlands and Matabeleland uprisings were, of course, excluded from the original Act. The assessment of injury sustained and determining factors for compensation were narrow. There was no guideline for an assessment of psychological sequelae²⁶, and a claimant’s compensation was determined by the degree of disability resulting from the injury, with “degrees of disability” being ascribed to various injuries (loss of foot = 25% disability).

The procedure to apply for compensation was broad, vague, unstructured and gave the Commissioner total discretion - “basically the Act does not describe ‘the prescribed manner’”.²⁷ Notably, the procedure was modified in 1997 to curtail fraudulent claims, but the current system requires claimants to go to a government doctor. The doctor determines the amount of compensation, which “inappropriately gives the medical doctor power to make legal decision of compensation”.²⁸

It is estimated that there were more than 60,000 claimants to the War Victims Compensation Act, yet according to Reeler, the Act has been “so open to corruption” that the legitimate beneficiaries did not benefit.²⁹ Corruption resulted in discrimination in favour of some of the prominent war veterans. As one of the less prominent war veterans said: “A few people got compensation, but what happened to the rest? I believe the rest did not receive their money because the money was looted. The people who were in the forefront ... like the late Hunzvi for instance, he was in the forefront because he was a leader of the war veterans association, they looted; Andrew Ndlovu, he looted, swindled money and swindled property ...”.³⁰

²³ Ibid. 35

²⁴ A. Reeler, “Compensation for Gross Human Rights Violations: Torture and the War Victims Compensation Act”, *Legal Forum* (1998) 15.

²⁵ Commentators note that the absence of psychological trauma as an injury is excusable given that findings on Post Traumatic-Stress Syndrome did not come out until after 1980. The Director of Amani Trust said: “It wasn’t a terribly good piece of legislation but with justified grounds”. Interview with the Director, provided to the author by CSV.

²⁶ See A. Reeler (1998) 17.

²⁷ Ibid. 18.

²⁸ Ibid.

²⁹ A. Reeler (1998) 14

³⁰ Interview with M., war veteran, and now opposition MP, conducted by Paul Chizuze (2002).

Another victim said: “In 1994 or 1995 ... that fund was budgeted at Z\$480 million and the war veterans stole it, Z\$480m!” In 1996, according to one war veteran, a small group of prominent war veterans made “extortionist” claims on the Government. Mugabe awarded them a lump sum of Z\$50,000, a monthly tax-free pension of Z\$2000 (subject to ongoing review – by now Z\$25000) and health and education allowances³¹.

The initial lack of publicity contributed to why there was a surge in claims for compensation by war veterans in the mid-1990s. “The Act has not been well-advertised, so that many ordinary people didn’t realise that it should have catered for them ...”, according to Tony Reeler of Amani Trust.³² When word got out about the War Victims Act, claims increased. Victim statements provided to the author by the Centre for the Study of Violence and Reconciliation corroborate Reeler’s claim: As Ndlovu comments, “There was no publicity to let people know they are entitled to such a benefit. People remained ignorant”.³³ These statements, which are uncorroborated and relatively few in the large cannon of victim opinions, suggest that the Act is considered merely a social welfare programme for people who had been injured.³⁴ Regardless of personal sentiment about the aims of the Act, it is clear that the Act was limited and not set up to achieve either the ambitious goals of social welfare or the complete restitution of war victims;. It did not provide for a specific fund to be set up, but rather the funds were to come out of the general State coffers.

3.3.3. Victim and NGO Response: Alternative Routes toward Reparation

The response of a small number of victims, whose statements were provided to the author by CSVV, and the NGO community, seem to point towards two alternative routes for reparation in Zimbabwe. The first is the legal route, where courts of law are utilized as a means to secured fair compensation, but also as a tool for spurring greater action by the government. The second route is collective reparation, with emphasis on social and economic development in strategic areas of the country.

3.3.3.1. The Legal Route

Given that the War Victims Compensation Act offered only a narrow avenue of recourse for victims pre-1980 and no recourse for victims after the war of liberation, Zimbabweans have utilized the legal route in securing reparation and restitution for rights violated. Seeking redress for damages through civil actions within the legal system was considered a legitimate avenue in Zimbabwe until recently. Despite the barrier of amnesty provisions, lawyers have successfully argued some key precedent-setting decisions, which for

³¹ Interview with J.D., ex-ZIPRA Commander, member of War Veterans Association, by Paul Chizuze (2002).

³² Interview with Anthony Reeler, Amani Trust conducted by Richard Bischoff (2002).

³³ Interview with Ndlovu conducted by Paul Chizuze (April 16 2002).

³⁴ Interview with Brian C. by Richard Bischoff (2002).

instance established the nature of damages for torture and random shooting. Some of the most notable court cases came after the Food Riots in the late 1990s, when the government violated the principle of minimum harm, through the use of excessive force and brutality. The case of a woman tortured by police and then awarded Z\$1.5 million damages is an example of a court case resulting in large awards for the victim.³⁵ The case of Choto and Chavunduka is an example of one of the current problems with pursuing claims in court. Ray Choto and Mark Chavunduka were journalists who were severely tortured by the government after writing a 1999 article alleging an unsuccessful coup attempt. Though the case was decided against the government, the government delayed proceedings and has thus far avoided paying restitution.³⁶

There are other problems. First of all, there is the problem of *de facto* impunity, whereby the police do not investigate and simply drop charges or do not accept charges people put against them. The second set of problems arises from complications in civil court. There are tight statutes of limitation and prescriptions disallowing claims made more than 6 months after an alleged violation. Thirdly, there is the massive caseload. AMANI Trust estimates 20,000 human rights violations in the context of the 2000 elections alone yet the court system would collapse if even one-fifth of that number of cases were brought forward. Fourthly, pursuing claims in court is expensive. And fifthly, there is the fear factor: Pursuing reparation within the legal system is considered “impossible” today. The system is “completely and utterly contaminated” and is no longer able to provide justice on an objective basis. There has been a full-scale official attack on the judiciary, and court decisions are based almost entirely on the needs of the political executive.³⁷

3.3.3.2. *Collective Reparation*

Individual compensation for every victim is considered by some an impossible task.³⁸ Government cannot afford to compensate all primary and secondary victims individually. Abuse has been too widespread and dates back too far, and the sheer volume of victims makes the pursuit of compensation/civil damages through the courts impossible. AMANI Trust has intentionally limited caseloads to between 20 and 40 per year. Moreover, the development and implementation of a government-sponsored reparation programme independent of the courts would bankrupt the government. Therefore, the focus among NGOs representing the interests of Zimbabweans has been on realising “collective reparation” to whole communities. With “collective reparation”, the emphasis is on social and economic development in strategic areas. The director of Zimrights, an organisation set up to promote human rights in Zimbabwe, comments on the need for collective reparation:

³⁵ Ibid.

³⁶ Zimbabwe Human Rights NGO Forum, “Organized Violence and Torture in Zimbabwe in 1999”, (March 2000) 8

³⁷ Interview with G. (name withheld), professor of law and member, Amani Trust conducted by Shari Eppel (2002).

³⁸ “Breaking the Silence, Building True Peace” (April 1999) 29.

In terms of reparations, Zimrights had thought that reparation can never be individual, because the statistics are not up to date now, it's almost twenty years but you would find that where the 5th brigade did more harm and then it would be compensated as community development, dip tanks, schools, universities, technology, agriculture and so forth. You find that certain areas are underdeveloped because that six year period meant a lot to the people, there was no proper development, up to now there are no good roads from here to Nkayi.³⁹

This attention has been manifest in a trust fund – “Reconciliation/Uxolelwano Trust” – that was recommended in 1999 by CCJPZ and The Legal Resources Foundation to facilitate these collective measures, to identify what communities wanted and then to oversee development projects and preventing abuse of funds.

3.3.4. Consequences for Limited “Reparation” in Zimbabwe

Aside from encouraging symbolic, collective measures aimed at restoring the dignity of victims of human rights abuses during the mid-1980s, the objective of human rights NGOs has been to encourage the amending of the War Compensation Act. The hope is to amend the Act to reflect current medical findings that place importance on rehabilitative measures to deal with the psychological effects of war; reflect current trends, research and experience from the UN’s Commission on Compensation and from the academic realm in the development and implementation of compensation schemes; and, to include the thousands of victims of the uprisings of the 1980s.

Reeler suggests that not opting for “reparation” (here defined by him as composed of justice, rehabilitation and compensation) has had “pernicious consequences”⁴⁰. The legacy of choosing “reconciliation” over “reparation” after the War of Liberation created a contemporary Zimbabwean society where justice has been avoided, corruption has been institutionalised and apathy based on fear exists among the population. In Zimbabwe, NGOs call for the need to overcome the tragic reality that people are “used to a situation where the Government shows no respect for civil and human rights”⁴¹, and where wrongdoers have not been brought to justice. Though victims and civil society organisations seek reparation as compensation, justified in part by traditional Shona law that compensation follows some kind of wrong between people, there is also a strong demand for justice, accountability and rehabilitation for the severe trauma caused by torture and violence. As one victim of recent torture has said: “I want them to be sued, to go to jail and compensate me at the same time. I know that they are the ruling party and I know that they have got many tricks, they can take two months, three months, four months, saying we are going to do this and that for you. But to me it is

³⁹ Interview with F by Paul Chizuze (2002).

⁴⁰ Interview with A. Reeler, Amani Trust conducted by Richard Bischoff (2002).

⁴¹ “Breaking the Silence, Building True Peace” (April 1999).

my food, my life, because as it is now, I won't walk the same way I used to walk before I was beaten up. That also disturbed my brain too much."⁴²

A "failed" reconciliation has contributed to the delay in the realisation of a stable democracy in Zimbabwe; an instable democracy, in turn, has reinforced the effects of a failed reconciliation. It is argued: "A stable democracy in Zimbabwe will remain a distant dream as long as the sad legacy of violence and discrimination against an ethnic/regional minority is not dealt with in a genuine and thorough process of reconciliation".⁴³ Some might argue that Mugabe himself is the problem. What is known is that in Zimbabwe the problem is not lack of documentation of the wrongdoing or of testimony by the victims. The problems vis-à-vis reparation and reconciliation may be summed as, limited or non-existent legal recourse for certain victims; impunity given to perpetrators; and lack of accountability on the part of government to honestly acknowledge the past, compensate and rehabilitate victims, and provide at least some measure of justice to wrong-doers.

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⁴² Interview with N. (name withheld), a 32 year old trader (date unknown), provided to the author by CSV.R.

⁴³ Ibid.

3.4. Namibia

Namibian independence from South Africa in March 1990 was widely celebrated in the Southern African region and throughout the world. For generations, Namibians had been victims of colonial domination and internationally condemned human rights abuses; first at the hands of Germans (1888–1914) and then the South Africans (1914–1990). Melber writes, “ending such an intolerable anachronism of systematic violation against human rights towards the end of the twentieth century was a long overdue correction of moral injustice and in itself an achievement that marked historic progress”.¹ However, perpetrators of human rights violations were also to be found among the chief liberators, the South West Africa People’s Organisation (SWAPO). The newly independent Namibia, under the leadership of President Sam Nujoma of SWAPO thus had a complex history of human rights abuses to deal with. To date the government has done very little to accommodate these demands.

More than a decade after independence, in 2002, an official in the Ministry of Justice said that the Namibian government appears “unwilling to participate” in a reparation programme and that there is “nothing in the pipeline that relates to it”.² Why has the Namibian government not developed a reparation programme? The answer lies partly at the heart of this comment by another official: “It is better for the Government not to initiate any such programme or policy for reparation because fingers will show in their direction.”³ An armed struggle between Namibian nationalists and South Africa started in 1966. Violence and human rights abuses were perpetrated by both sides. As noted below, SWAPO distinguished itself from other Namibian political liberation parties in that it had an active military wing, and moreover one that perpetrated acts of violence and abuse not only against the apartheid regime but also against some of its own members and communities. When SWAPO claimed power after independence, they brought a spirit of liberation, yet with a legacy of repressive political and military activity. The political constraints preventing the new Namibian government from initiating a reparation programme stem directly from the nature of the human rights abuses and the power structure resulting from the political transition.

3.4.1. Historical Background of Gross Human Rights Violations and Claims for Reparations

“Funny things happened during the German and South African [rule] of Namibia,” said Clement Daniels, Director of the Legal Assistance Centre, ironically. He added: “Gross human rights violations took place, people were arrested and detained and groups of people were massacred”.⁴ In particular, the historical atrocities during the colonial period at the hands of the German military authorities are well documented.

¹ H. Melber and C. Saunders, *Transition in Southern Africa – Comparative Aspects* (2001) 20.

² Interview with Hezekiel Awaseb, Ministry of Justice, conducted by E. Muinjangu (CSV, May 2002).

³ Interview with Toussy Namiseb, Office of the Ombudsman, conducted by E. Muinjangu (CSV, June 2002).

⁴ Interview with Clement Daniels, Director of LAC, conducted by E. Muinjangu (CSV, June 2002).

Between 1907 and 1915, Germans were responsible for wide-scale political repression and violation of basic human rights in what effectively amounted to the first genocide of the 20th century.⁵ More than 100,000 Africans (mostly Hereros and Namas) were killed between 1904 and 1908, after the Germans issued an extermination order against the African resistors. “The genocidal campaigns against the Herero and Nama”, writes Cooper, “[were] among the most inhumane actions of the colonial era”.⁶ One push for reparations in Namibia comes from claims of gross violations of human rights perpetrated against the Herero and Nama people by German colonialists at the turn of the 20th century. The Herero community has vigorously attempted to lobby the German government to recognize the 1904 genocide, officially apologise for wrongdoing, and pay compensation. This had been met with mixed messages from German officials, but in a ceremony in August 2004 in the Omaheke Desert marking the 100th anniversary of the Herero genocide, Germany's Minister for Economic Cooperation and Development, Heidemarie Wieczorek-Zeul, recognized German guilt and asked for forgiveness. At that time she announced an \$11.5 million development aid package but did not specifically address individual compensation⁷. In 2005, Germany established a special fund with \$28 million paid over 10 years for development initiatives in the regions where the Herero, Nama and Damara live⁸. Controversy has since followed, as there is debate over who exactly should receive the funding, the Namibian government or the Herero people individually. Simultaneously, the Herero Reparation Group (HRG) and the Hosea Kutako Foundation (HKF) have also initiated a multi-billion dollar court case in the United States on behalf of the Herero community.

The Herero case has wider significance because civil society organisations pushing for reparation believe that a successful ruling in the Herero case will have an impact on the push for reparation programmes for victims of SWAPO abuses. A National Society for Human Rights press release opines: “The [SWAPO] government does not have any policy on reparation and when [the Herero] case succeeds it will force them to go in that direction”.⁹ The case may indeed provoke more lawsuits, against either the Namibian government, the South African government or businesses, and may reinforce the threat of lawsuits against other African governments that aided SWAPO.

The lawsuit that is most relevant to this study concerns the civil society organisations such as Breaking the Wall of Silence Movement (BWS), the National Society for Human Rights (NSHR) and the Legal Assistance Centre (LAC), which are campaigning for compensation through a government funded programme to victims

⁵ For a detailed account, see A. Cooper (2001) *Ovambo Politics in the Twentieth Century*, and *SARP Country Report on Namibia* (2003) 13 – 14.

⁶ A. Cooper, *Ovambo Politics in the Twentieth Century*, (2001) 9.

⁷ German Federal Ministry for Economic Cooperation and Development, September 2004 Newsletter, found online at <http://www.bmz.de/en/press/nl/nl2004/newsletter29/002.html>.

⁸ German Federal Ministry for Economic Cooperation and Development, June 2005 Newsletter, found online at <http://www.bmz.de/en/press/nl/nl2005/newsletter06/003.html>.

⁹ “Namibians to Sue African Governments”, *Press Release by National Society for Human Rights*, (Feb. 22, 2001).

of human rights abuses by SWAPO in Zambia, Tanzania, Angola and elsewhere in the late 1970s through the 1980s. In addition to demanding an official reparation programme from the government (as well as the establishment of a truth and reconciliation commission), these organisations have threatened lawsuits against the governments of Tanzania and Zambia for their role in working with SWAPO to commit serious internationally prohibited human rights abuses against SWAPO dissidents in the late 1960s through to the late 1980s.¹⁰ These violations include arbitrary arrests and detentions, torture, and summary executions.

After World War I, as part of German reparations to the Allied Forces (USA, Britain, France, Japan), South Africa (then a British colony) succeeded in taking over the governing of Namibia (then South West Africa). South Africa was given a mandate of trusteeship under the League of Nations. At the time, South Africa was no longer a colony but had Dominion status within the British Empire. It was only much later, after the Second World War and the demise of the League of Nations, that South Africa assumed direct rule. By the 1950s, South West Africa, as an extension of apartheid South Africa, was a *de facto* South African colony. Under South Africa rule, Namibians experienced gross human rights violations mirroring what was happening in apartheid South Africa. “In addition to its policy of an institutionalised regime of systematic oppression, characterised by racial domination and discrimination, forced removals and/or evictions, displacement and land dispossession, apartheid SA forces committed other gross violations of human rights, including summary executions, enforced disappearances, mass arbitrary arrests, torture and prolonged arbitrary detention without trial against the people of Namibia”.¹¹

More recently, following South Africa’s own democratic transition in the 1990s, former Namibian political prisoners who had been imprisoned on Robben Island have pushed for reparations from South Africa. One among the 60 Namibian political prisoners on Robben Island is the Namibian Prisons Minister, Andimba Toivo Ya Toivo. He served 16 years on Robben Island, along with Mandela and other ANC leaders. Ya Toivo accused the ANC-led South African government of “betraying” their former comrades from Namibia by not including them in the compensation paid to former South African political prisoners. He is demanding a share of money and services raised by the special South African trust to pay pensions to former South African political prisoners. In a letter to fellow Robben Island inmate Ahmed Kathrada, Ya Toivo wrote: “Now our South African brothers in the struggle, our comrades, seem to have forgotten that we were a family that stood and suffered together in the same trenches.”¹²

¹⁰ P. ya Nangoloh, Executive Director of the National Society for Human Rights, “Namibians to Sue African Governments”, Press Release (February 22, 2001).

¹¹ SARP Country Report on Namibia (2003).

¹² G. Moodie, “Our SA Comrades Have Cheated Us”, Sunday Times (March 16, 2003).

After the Second World War, when apartheid came to Namibia from South Africa, Namibian students began slowly mobilising to liberate Namibia. What was initially a group of students quickly evolved into a political organisation with a paramilitary operation (PLAN - People's Liberation Army of Namibia) aimed at overthrowing the South African colonial government. SWAPO was founded in 1958 as the "Ovamboland People's Congress" and changed to the "Ovamboland People's Organisation" in 1959 before taking the name South West Africa People's Organisation. As the original name suggests, SWAPO has always drawn heavily from the majority Ovambo ethnic group (50% of the population) for political support.¹³ The armed struggle between Namibian liberators and South African colonialists began in 1966. Historians noted that "the formation of SWAPO coincided with an increasingly intensified repression of the Namibian people by the South African colonial regime," and that "SWAPO distinguished itself from the rest of the political parties inside the country through the creation of a military wing".¹⁴ SWAPO eventually succeeded in gaining political control of an independent Namibia in 1989. It has maintained a majority in Parliament ever since.

Although SWAPO's armed struggle had a "major impact on the further course of decolonisation" in Southern Africa it was not the decisive factor in garnering independence.¹⁵ It was sustained and intense pressure by the international community, which had taken an interest in Namibian politics since 1921, firstly, through a League of Nations refusal to "give the ex-colony outright to South Africa because of South Africa's offensive segregationist policies" (a refusal which South Africa disregarded) and forty years later through a United Nations-brokered settlement between Namibia and South Africa that resulted in a Transitional Government of National Unity (1985).¹⁶ Saunders concludes that, in addition to SWAPO's armed insurgency, the settlement came after nearly nine years of negotiations among South Africa, the Western Contact Group (France, West Germany, Britain, Canada and the United States), and SWAPO. It would take four more years for an agreement to be reached on Independence.¹⁷

3.4.2. Context of Transitional Justice and Promise of Reparation

¹³ Note also, "the remaining 10 ethno-linguistic groupings comprise less than 10 percent of the population each". Ibid, 40.

¹⁴ "Report to the Namibian People: Historical Account of the SWAPO Spy Drama", issued by Breaking the Wall of Silence Movement (1997).

¹⁵ H. Melber, "Liberation and Democracy in Southern Africa: The Case of Namibia", in Hennin Melber and Christopher Saunders, Transition in Southern Africa – Comparative Aspects: Two Lectures, Nordiska Afrikainstitutet Discussion Paper 10 (2001) 21. Rotberg, too, writes that SWAPO was too weak militarily to "mortgage South Africa's hold on Namibia". See Rotberg (2002) 125.

¹⁶ R. Rotberg, Ending Autocracy, Enabling Democracy: The Tribulations of Southern Africa (2002)122.

¹⁷ C. Saunders, "From Apartheid to Democracy in Namibia and South Africa: Some Comparisons", in Hennin Melber and Christopher Saunders, Transition in Southern Africa – Comparative Aspects: Two Lectures, Nordiska Afrikainstitutet Discussion Paper (2001).

Political change in Namibia thus came as a result of lengthy and complicated negotiations dominated by the strategic interests of Western nations.¹⁸ South Africa undermined the negotiation process on several occasions, at times seeking to settle the matter with alternative “home-grown” solutions, which were essentially ethnically-divisive policies favourable to the white minority (comprising only a tenth of the population). It is important to note that while SWAPO garnered popular support, there also were divisions within SWAPO that resulted in fragmented political groupings such as the Namibian National Front and SWAPO-Democrats. The Namibian transition held additional significance for the region; independence of Namibia was a “necessary prelude to changes in South Africa”.¹⁹ As Melber notes: “Namibia was the laboratory for testing the scope of controlled change for South Africa too”.²⁰

All eyes of the West and of South Africa were on SWAPO, which won a majority of the 72 seats in the constituent assembly in the 1989 elections. Embittered by a negotiation process overly dominated by external pressures, but eager to consolidate power in an independent Namibia, SWAPO appeased international pressure by adopting many of the recommendations put forth in the negotiations. If nationalism was SWAPO’s primary ideology, independence was its primary objective. Its strategy would need to prove politically prudent in the eyes of international as well as national audiences. One consequence of this strategy was one of the most liberal constitutions ever written. The new Constitution was “internationally hailed as an exemplary document for the promotion and protection of human rights”²¹ and contained guarantees for all basic human rights, including the right to redress and effective remedy”.²² Article 23 of the Constitution grants Parliament the right to enact legislation “providing indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices”.²³ Here, reference is deliberately made to South Africa’s apartheid.

Another consequence was that the new government adopted a policy of “national reconciliation”²⁴. The policy of national reconciliation included an adherence to UN Security Council Resolution 385 (also known as the Western Settlement Plan), requiring the release of political prisoners and a “full and unqualified, i.e., blanket amnesty for all crimes committed for political reasons by SWAPO and South African security

¹⁸ H. Melber, “Liberation and Democracy in Southern Africa: The Case of Namibia”, in H. Melber and C. Saunders, Transition in Southern Africa – Comparative Aspects: Two Lectures (Nordiska Afrikainstitutet Discussion Paper 10 (2001) 21.

¹⁹ Ibid.

²⁰ Ibid. (my emphasis)

²¹ SARP Country Report on Namibia (2003) 21.

²² Constitution of The Republic of Namibia, Articles 18 and 23.

²³ Constitution of The Republic of Namibia, Articles 23, 2.

²⁴ See Paragraphs 2 and 3, Resolution of the Central Committee of SWAPO adopting the Policy of National Reconciliation”, (May 23, 1989) cited in the SARP Country Report on Namibia (2003) 33.

forces”.²⁵ Accordingly, Namibia’s policy of national reconciliation deliberately avoided dealing with past human rights violations, focusing instead on that which “was postulated as building a unified nation”.²⁶ Beyond the unification rhetoric lay the reality that neither SWAPO nor South Africa wanted the past history of human rights abuses to be investigated or victims to be compensated.

Even though both SWAPO and the South Africans released political prisoners, neither side accounted for those who disappeared or published information on the total number arrested and detained during the 23-year war. Consequently, vital details, including the number of detainees and the names of the disappeared, remain largely unknown.²⁷ During the election campaign for the Constituent Assembly in late 1989, parties opposed to SWAPO seized upon damning testimony against SWAPO by recently freed prisoners, in order to initiate discussions about SWAPO’s human rights abuses. As Dicker noted: “Their testimony was highly damaging to SWAPO, and it became politically explosive ... [They] displayed their physical scars at campaign rallies and described their treatment in the SWAPO camps”.²⁸

Apart from the well-documented political atrocities by the South African administration and military forces already mentioned, human rights abuses by SWAPO have been the focus of more recent calls for investigation. SWAPO is accused of initiating a reign of terror against its own members, as well as against innocent Namibians, beginning as early as the mid-1960s and escalating into “wholesale” abductions and arrests in the mid-1980s.²⁹ Victims, NGO groups and observers generally allude to three phases of repression and violence by SWAPO: the Kongwa Crisis in the 1960s, the Shipanga Crisis in the mid-1970s, and the SWAPO Spy-Drama, 1983–1985.³⁰ The third of these phases is the focus of the claims for reparations by the BWS Movement in the late 1990s. By the early 1980s, SWAPO had been embroiled in mismanagement and dishonesty, and its security forces acted, in many cases, with a reckless disregard for human rights. A massive witch-hunt led by SWAPO followed allegations that spies for the South African authorities had infiltrated SWAPO ranks. Beginning in 1983, hundreds were detained in SWAPO-led prison camps and tortured on charges of being agents of the South African regime. “Many remained in these

²⁵ SARP Country Report on Namibia (2003) 18 and 48. The Report cites the following as additional sources to its claim, see footnote 104: “Lists of Missing Persons”, National Society for Human Rights (1989); “Nico Basson and Ben Motonga, “Call them spies: The Namibian spy drama”, African Communication Projects (October 1989); “A critical Analysis: SWAPO’s ‘Book of the Dead’”, National Society for Human Rights (1996); “A Report to the Namibian People: Historical Account of the SWAPO-spy-drama”, Breaking the Wall of Silence Movement (BWS) (1997).

²⁶ G. Erasmus, “The Constitution: Its Impact on Namibian Statehood and Politics”, in Christiaan Keulder (ed.), State, Society and Democracy: A Reader in Namibian Politics (2000) 78.

²⁷ R. Dicker, Accountability in Namibia: An Africa Watch Report (1992) 2.

²⁸ *Ibid.* 3.

²⁹ *Ibid.* 111- 116. For a more detailed account of SWAPO abuses see John Saul and Colin Leys (eds.), Namibia’s Liberation Struggle: The Two-Edged Sword (1995) 40 – 65.

³⁰ “Report to the Namibian People: Historical Account of the SWAPO Spy Drama”, issued by Breaking the Wall of Silence Movement (1997) 11 – 12.

dungeons for years, several died there and others were killed by members of SWAPO's internal security organ which carried out the arrests. The spy drama became self-sustaining, generating terror and paranoia within SWAPO that led to more arrests.³¹ Torture by SWAPO agents is well documented³², as are the inhumane, primitive, and sickly conditions of the dungeons.³³

Victims included ex-detainees of SWAPO and PLAN, many of whom are survivors of torture; children who were captured and imprisoned; and families of the disappeared. As explained by Daniels and confirmed by Africa Watch³⁴, the majority of victims were young, non-Ovambo members from the South and Centre of Namibia. Ethnically charged violence has been alleged: "SWAPO's violations were perpetrated by the movement's security services, also consisting almost exclusively of members of the majority Ovambo ethnic group. The majority of the victims were either members of minority ethno-linguistic groups or intellectuals".³⁵ Victims were members of ethnic minorities and are today not politically powerful.

Estimates of the number of persons believed to have died in SWAPO detention centres reach two thousand, although this figure has been very difficult to pinpoint with accuracy as many families have "held back" from reporting missing individuals.³⁶ The Parents' Committee of Namibia (PCN), a human rights pressure group set up to campaign for the release and repatriation of SWAPO-held political prisoners, also pressured SWAPO to account for all those who disappeared while in their camps.³⁷ SWAPO responded through Mr. Theo-Ben Guirab, its Foreign Secretary, who "publicly regretted the brutal treatment, adding that abusive interrogators would be held responsible for their actions and that if the matter was not properly dealt with, the wounds of war could never heal".³⁸ However, requests by the political opposition for an inquiry into human rights abuses have so far been rejected.³⁹

3.4.3 Calls for reparation and reconciliation

³¹ M. Parlevliet, "Truth Commission in Africa: the Non-Case of Namibia and the Emerging Case of Sierra Leone" (2001) 101.

³² "Report to the Namibian People: Historical Account of the SWAPO Spy Drama", issued by Breaking the Wall of Silence Movement (1997) 21 – 22.

³³ R. Dicker, Accountability in Namibia: An Africa Watch Report (1992) 82 – 85.

³⁴ Interview with Daniels (2002). Also, R. Dicker (1992) 1.

³⁵ SARP Country Report on Namibia (2003) 17.

³⁶ R. Dicker (1992) 116.

³⁷ SARP Country Report on Namibia (2003) 20.

³⁸ R. Dicker (1992) 3.

³⁹ C. Saunders, Transition in Southern Africa (2001) 12; M. Parlevliet, "Truth Commission in Africa" (2000) 101; and Dicker, Accountability in Namibia (1992) op. cit 112 – 116.

Since there has been constant denial and a failure to apologise for wrongdoing from both SWAPO and the South Africans, reconciliation is considered an “undeveloped concept”, according to Ben Ulenga.⁴⁰ Since Independence, however, there have been government-sponsored initiatives aimed at reintegrating soldiers, at providing for war veterans and for war orphans, and for honouring the liberation struggle. Together, these programmes amount to a commendable reconstruction programme, but they do not meet the test for “reparation” as demanded by human rights organizations and many of the victims they represent.

In 1999, the Government passed the War Veterans Subvention Act (Act 16 of 1999) to provide financial compensation, as determined by the Minister of Health and Social Services, to “war veterans” and “dependents of deceased war veterans”. Human rights organisations suggest, ironically, that clearly the term “war veteran” does not apply to “persons, or dependants of persons, who have been detained by SWAPO in exile on accusations that they were spies for apartheid SA”.⁴¹ Also, since May 1996 the Government has given roughly N\$330m to a total of 1,134 orphaned children whose parents died during the liberation struggle, while the Ministry of Lands, Resettlement and Rehabilitation has “constructed and allocated altogether 160 houses to some beneficiaries in the various regions of the country”.⁴² Attempts at honouring the liberation struggle and those who fought within it, through memorials and holidays such as Independence Day (March 21), Heroes Day (August 26) or Cassinga Day (May 4), are usually political rallies aimed at glorifying SWAPO as the true liberation party in Namibia. These events are met with scepticism by human rights organisations and are considered to be politically polarising.⁴³

While compensation as reparation is certainly important in this case, interviewees indicate a broader view of reparations. Comments focus on reparation as psychological support, counselling, and services such as education and employment. In addition, aside from tangible benefits and services, some victims want an apology: “We do not want to be paid money, if the SWAPO government can just apologise that will make a big difference.”⁴⁴ Another concern is memorialisation. Ex-detainees want acknowledgement of their suffering embedded in the national memory; since 1994, there have also been demands for a truth and reconciliation commission. As the leading advocate of a truth and reconciliation commissions (TRC), the NSHR “firmly believes that a TRC creates a best opportunity for truth telling, acknowledgement of guilt, reparations and guarantees of non-repetition leading to genuine national reconciliation with justice”.⁴⁵

⁴⁰ Interview with Ben Ulenga, leader of the opposition party (Congress of Democrats) and former Robben Island political prisoner, conducted by E. Muinjanque (November 2002).

⁴¹ SARP Country Report on Namibia (2003) 25.

⁴² *Ibid.* 26. The Report cites, “Directorate of Resettlement and Rehabilitation”, Namibia: A Decade of Democracy and Prosperity 1990–2000, Office of the Prime Minister, Republic of Namibia, Windhoek (March 21, 2000) 225.

⁴³ SARP Country Report on Namibia (2003) 28.

⁴⁴ Interview with Ulenga (2002).

⁴⁵ SARP Country Report on Namibia (2003) 55.

3.4.4. The Non-Development of Programmes Aimed at Reparation

The failure to adequately “deal with the past”, in particular through core elements of truth telling and reparation, has serious consequences for Namibian society, according to Michele Parlevliet. She contends that “the failure to account for past abuses has had serious consequences for the organisation of society in Namibia and the character of Namibian democracy, especially regarding the relations between state and society, the leadership’s attitude towards criticism and dissent, and the use of force by state security forces”.⁴⁶ For BWS, the unwillingness of the SWAPO government to acknowledge wrongdoing and to initiate reparation affirms the sad reality that Namibian people have been “misled by SWAPO phrase-mongering and empty promises of ‘democracy, respect for human rights and the rule of law’”.⁴⁷

Ironically, according to the government, exposing old wounds would undermine “reconciliation”. The government responded with vociferous admonition to the 1996 publication of Rev. Siegfried Gorth’s Namibia: The Wall of Silence, which detailed SWAPO human rights abuses. President Sam Nujoma condemned it as “false history” while other SWAPO leaders “called SWAPO supporters to battle stations, declaring war on the ‘unpatriotic elements’ and ‘foreign remnants of fascism’ threatening national reconciliation by bringing the detainee issue into the open”.⁴⁸ SWAPO covers its tracks by reminding critics of its policy of national reconciliation, which encourages cooperation between former opponents. This, SWAPO asserts, was necessary for a peaceful transition.

By resisting the temptation to insist that crimes committed by the apartheid regime be “brought to light”, SWAPO conveniently relegates its own dismal human rights record to the background.⁴⁹ This draws significant criticism and critical remarks by human rights organisations. As Dicker wrote: “For victims, their families and friends, it is not possible to simply forget”.⁵⁰ He quotes a victim as asking: “How can there be reconciliation when so many disappeared? It is necessary to follow up against the South Africans with claims for property and crops destroyed. To heal, something has to be done in the form of compensation. But nothing has been done.”⁵¹ Victims do not buy the argument that human rights abuses were inevitable or justifiable consequences of the war. As one victim argued:

In response to the argument that the South Africans did it too, we cannot equate South African colonial rule with SWAPO. The organisation has always been seen as being different from the

⁴⁶ M. Parlevliet, “Truth Commission in Africa” (2001) 100.

⁴⁷ BWS Report 30.

⁴⁸ SARP Country Report on Namibia (2003) 57.

⁴⁹ Ibid.

⁵⁰ R. Dicker, Accountability in Namibia: An Africa Watch Report (1992) 4.

⁵¹ Ibid. 5

enemy. It's ridiculous to equate ourselves with the South Africans. We've never been the same. While the South Africans have tortured our people ... SWAPO has tortured its own people. Many people will say that it was the war and that these things happen during a war. My view is that no amount of wrongs ever make a right. You can't use the war as an excuse to cover things over, to hide them under the carpet.⁵²

Aside from the aforementioned lack of political will to expose the "truth" and to create mechanisms for accountability, there are two additional commonly cited problems that speak to the lack of capacity to push for reparations: 1) government-induced fear; and 2) weakness of the political opposition. "Namibians are afraid to speak," acknowledges Daniels, "to express themselves against issues that concern them but are against the government. The political climate is not conducive to addressing issues such as reparation".⁵³ Although there are provisions in the Constitution for claiming redress for human rights violations, taking the government to court is not easy. The judiciary and the legal profession are "still independent and human rights defenders continue to actively operate" and have "since independence been under increasing pressure from the [government] and/or its supporters".⁵⁴ According to Ulenga, "political maturity in Namibia is lacking and for victims to demand reparations as individuals (rather than as a group) is like a suicide attempt".⁵⁵ Critics also blame the government for not recognising the competence of the numerous international treaties and covenants that give victims of human rights abuses recourse to claims for redress.⁵⁶ There are also the serious concern over logistical constraints, such as the inability in many cases to prove wrongdoing, or to identify victims and perpetrators, and the fact that detentions happened more than fifteen years ago.⁵⁷

Despite the non-development of a national reparation programme, the movement for reparations, according to those in the civil society community, is not futile. Indeed, civil society organisations feel they are having an impact, even if they are not having the desired effect of true reconciliation. Gertze believes that civil society organisations such as NSHR are "not quiet at all when it comes to issues relating to violation of freedom and rights ..., these societies put pressure on the state, which is why the state has developed such a hostile attitude to them".⁵⁸ This is evidenced in reports that high-ranking government and SWAPO officials

⁵² Cited in R. Dicker (1992) 6. The victim is not named.

⁵³ Interview with Daniels (2002).

⁵⁴ *SARP Country Report on Namibia* (2003) 51. The Report cites the following, see footnote 11: "The Judiciary Under Siege; Special report for 1995", National Society for Human Rights (NSHR) (January 5, 1996) and "Right to Fair Public Trial and Administration of Justice: Attacks on the Judiciary", *Namibian: Human Rights Report, 1995–2001*, National Society for Human Rights (NSHR).

⁵⁵ Interview with Ulenga (2002).

⁵⁶ *SARP Country Report on Namibia* (2003) 44–47. The Report suggests the government acceded to the following international bodies but refuses to "recognize the competence" of their mandate to consider petitions on behalf of victims: The International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Discrimination (Article 14), the Convention on the Rights of Women (Article 2 of the Optional Protocol), and the Convention against Torture (Article 22).

⁵⁷ Interview with Daniels (2002).

⁵⁸ Interview with Kala Gertze, Lecturer at the University of Namibia (April 2002).

have treated human rights organisers with “open hostility and hatred”; “quite often NSHR staff members have been systematically subjected to name-calling, character assassination and ridicule, branded ‘traitors’, ‘unpatriotic elements,’ ‘anti-Government’, ‘un-African’ and or even ‘spies in service of Western governments’.⁵⁹ Furthermore, Gertze affirms that BWS has helped her “come to terms with the past and realise that her suffering and experience has been put to good use in calling perpetrators to order and salvaging the wounds of victims”.⁶⁰

Civil society organisations have applied pressure on the government to ratify and uphold international treaties⁶¹, to uphold the rule of law, promote a democratic culture, to identify and develop appropriate psychological support for war victims⁶², to expose the detainee and missing persons issue⁶³, and to provide legal aid for the protection of human rights and the public interest.⁶⁴ The challenge is to maintain cohesion among victim groups. Herero’s Reparation Group advocates for Hereros, BWS advocates for ex-detainees, while the Socio-Economic Integration Programme for Ex-combatants Company (SIPE) promotes the reintegration of ex-combatants. Advocates for victims other than SWAPO ex-detainees, such as the San ethnic minority who continue to suffer discrimination, members of the former South West African Territorial Force (SWATF), or civilian victims from the Caprivi and Rundu areas affected by political strife in the late 1990s, are now becoming more prominent as the campaign for reparations in Namibia strengthens. As Dicker noted, the politicisation of the ex-detainee issue during the first election overshadowed legitimate claims by other groups. In other words, the ex-detainee issue has monopolised human rights discussions in post-Independent Namibia.⁶⁵

In conclusion, claims for reparations have thus far gone unaddressed for several reasons, namely: Namibia’s restrictive political and judicial culture caused primarily by an ethnically dominant, one-party political system; SWAPO’s shallow policy of national reconciliation, which included blanket amnesty; SWAPO’s unwillingness to participate in a truth commission; ethnically charged politics and a culture of ethnic discrimination; the relative political weakness of individual victims and civil society; and the culpability of colonial powers. The government’s failure to deal with the past is based not only on the fear that liability

⁵⁹ SARP Country Report on Namibia (2003) 56. The Report cites, “Attacks on freedom of opinion and expression”, Namibia: Human Rights Reports 1998 to 2001, National Society for Human Rights (NSHR), Windhoek, Namibia and “Government hostility towards NSHR”, Namibia: Human Rights Report 1994, National Society for Human Rights (NSHR) (February 24, 1995) 17-18.

⁶⁰ Ibid.

⁶¹ SARP Country Report on Namibia (2003) 54: “The rationale behind such campaign lies in the fact that ratification of all international human rights and humanitarian law instruments not only obliges [the government] to comply with the norms of international law, but it also puts in a better position international supervisory bodies as well as national and international civil society organisations to monitor and evaluate [the government’s] compliance with such treaties.”

⁶² This is the main objective of the People’s Education, Assistance and Counselling for Empowerment (PEACE) Centre.

⁶³ This is the mission of the Breaking the Wall of Silence Movement (BWS).

⁶⁴ This is the primary task of the Legal Aid Centre (LAC).

⁶⁵ R. Dicker, Accountability in Namibia (1992) 3.

may undermine political power, but also that “truth-telling” would result in the return of civil war.⁶⁶ Parlevliet predicts: “With regard to the future, it is clear that as long as SWAPO remains in control of the government past abuses will not be addressed. Only if a transfer of political power to the opposition were to occur will there be a possibility of tackling the legacy of the past”.⁶⁷ Despite international pressure during the transition, the SWAPO government has not been held accountable for a failure to implement any significant programme to aid or acknowledge victims of human rights abuses. National reconciliation and unity pursued through “amnesia” and amnesty may be politically advantageous in the short-term, but the Namibian case shows that it cannot hold over the long term.

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⁶⁶ SWAPO Press Release (July 8, 1999) Office of Secretary General, “It is either reconciliation or the opening of old wounds,” cited in Parlevliet (2001) 104. The Press Release reads: “... as part of its programme of nation building and the healing of wounds of the past, the leadership of SWAPO formulated and adopted a policy of national reconciliation in 1989. The policy was intended to guard against the fact that, if the Namibian people allow themselves to engage in witch-hunting and retribution, the consequences of such a exercise will not be in the best interest of peace and stability in Namibia”. Additionally, a “Media Statement by SWAPO Party on the So-Called Detainee Issue” of March 12, 1996 counters criticism by Siegfried Groth, author of Breaking the Wall of Silence (1996) by maintaining that SWAPO “cannot allow this country to be made ungovernable and be turned into a chaotic and lawless society by irresponsible, unpatriotic elements and foreign remnants”. Cited in Melber (2001) 21.

⁶⁷ M. Parlevliet, “Truth Commissions in Africa” (2000) 105.

4. Conclusion: Lessons Learned and Recommendations

The objective of this study has been to shed light on a complex, and increasingly salient, topic within the broader arena of political and social transformation and its sub-field of transitional justice. Considering that the general issue of reparation as a mechanism for transitional justice has only recently emerged in the literature, the present study was conceived as an exploratory survey, an initial effort to “chart the way ahead” and provide a platform for future, more sophisticated and comprehensive social research. In this concluding chapter we must now turn to an assessment of the lessons learned from the different case studies.

By addressing the issue of reparation as a mechanism for transitional justice, I chose to explore a contentious issue, one wrought with high emotion that has real (as well as symbolic) political significance for a range of individuals and groups. By taking an empirical approach, I have attempted to bridge theory with practice. I have attempted to demonstrate the value of comparative empirical analysis as a building block for future studies of reparations, including better informed normative approaches. By focusing on South Africa and three of its Southern African neighbors, I have focused on a region of the world that is largely unexplored in the transitional justice literature, save for South Africa itself. I have also addressed the complex implications of the politics of liberation for transitional justice, since each of the four cases experienced political repression by a former regime that resulted in well-documented gross human rights violations both by the state *and* in the course of the various liberation struggles. Their different approaches to “reparation” have been influenced (and undermined) by the political and social contexts of governance after “liberation”. By choosing these case studies, I also have had the opportunity to compare the development of a holistic reparation programme as part of a comprehensive approach to transitional justice within a Truth and Reconciliation Commission (i.e. South Africa) in contrast to the limited, piecemeal approach of ad hoc reparation schemes (Zimbabwe and Malawi).

This final chapter will highlight some of the lessons learned from these cases and offer some recommendations for future development of reparation programmes. I want to first discuss the difference between reparation in the context of holistic truth and reconciliation processes, on the one hand, and piecemeal reparation measures and initiatives, whether these are official or civil society-based, on the other hand. The counterfactual question arises to what extent reparation would have been more effective and significant if it had been undertaken as part of comprehensive truth and reconciliation processes. In this regard we should consider Barkan’s suggestion that a holistic approach to reparation offers the opportunity for a form of “negotiated justice”¹. Next, I will highlight four broad categories of enabling and constraining factors in the development, or non-development, of reparation programmes: these are (i) the political

¹ E. Barkan, *Guilt of Nations* (2000), ix – xli, 308 – 346

achieved in the context of this holistic approach? Second, would a more focused stand-alone approach to reparation, one which was not part of a holistic truth and reconciliation process, have been more effective and successful?

In all three cases, “reparation” was implemented against the backdrop of “amnesty” to perpetrators of human rights abuses. One of the propositions on which the South Africa reparation programme was built is summed up by its Deputy Chairperson, Alex Boraine, who had argued at an early stage of the transition that “it is impossible to [award compensation to victims] adequately without knowledge and detail of the violations”². Conversely, with knowledge and disclosure of the particulars of violations (truth) it is impossible not to open up the issue of what to do with perpetrators. At a general conceptual level the difference between a holistic approach to reparation vs. piece-meal measures of reparation can be characterized in these terms. Thus the Malawian and Zimbabwean reparation measures could be described as attempts to deal with reparation for selected and limited categories of victims in ways that would *not* open up more general issues about truth and would not address what needed to be done about perpetrators. In the South African case, the holistic approach meant that amnesty for perpetrators became part of the same general process of reconciliation along with reparation for victims.

As far as the South African case is concerned, one conclusion might be that the victim-oriented truth and reparation process only happened in the wake of the amnesty for perpetrators agreement. In other words, while it is conceivable that South Africa could have had an amnesty process for perpetrators without a truth and reparation process for victims, it is *not* conceivable that South Africa could have had only a victim-oriented reparation process without amnesty (or justice) for perpetrators. In South Africa, reparation could only happen as part of a holistic process along with amnesty, or not at all. Reparation was thus considered a necessary counter-balance to amnesty, which was mandated by the Postamble of the Interim Constitution³ and by the TRC Act. In the South African case reparations only came into the picture as an integral part of the overall process and in order to help balance the perpetrator-oriented amnesty agreement. It was not a campaign on its own, independent of discussions about amnesty or truth-telling. More importantly to the development of both the Truth Commission and reparation was the controversial amnesty debate among negotiators that culminated in the seminal and controversial Constitutional Court case, *AZAPO v. President of South Africa* (1996). One of the consequences of this close relationship between amnesty and reparation in the South African case is that victims and advocacy groups (including the TRC itself) inevitably measured the results of the reparation recommendations against the amnesty activities. There was a definite concern why the final official decision about reparation had to wait for 5 years while the amnesty process ran its course. If the government’s response to the TRC’s recommendations had taken place in 1998, directly

² A. Boraine, *Country Unmasked* (2000) 33.

³ *Ibid.*

following on from the submission of the TRC Report, then a considerable part of the frustration and disappointment with the reparation process might have been avoided.

It is significant in the South African case, in contrast to the other cases, that the idea of a Truth Commission, which was proposed to President Mandela and Minister of Justice Dullah Omar by civil society organizations in 1994, was, in the end, supported by key figures in the leadership of the ANC. In the other cases of Zimbabwe, Malawi and Namibia, the new government resisted calls for a truth commission, favoring instead a general amnesty along with limited compensation for victims. By mid-1994, proposals for a TRC were in principle accepted by the ANC Minister of Justice Omar. The key point of departure in the South African case is that during the negotiations leading up to the Interim Constitution, the governing National Party called for general amnesty, but the ANC would not budge from its position that only a broader reconciliation provision that included amnesty only for those who were willing to disclose their crimes was acceptable⁴. A reparation programme in the context of a truth commission came into being as a by-product of the protections provided for perpetrators, such as amnesty and special pensions.

The case of South Africa demonstrates the opportunities and complications for reparation within a holistic process. Clearly, one of the greatest achievements of the South Africa holistic process is that victims were given a great deal of attention in the process. The public response to the victim hearings was significant, and for the first time in South African history, victims of gross human rights abuses were given voice and to some degree power. At the same time, perpetrators seeking amnesty were disclosing the truth of their crimes in a public forum. At other and more practical levels, the concurrent processes also created serious complications. Thus, victims hearings were constrained by the legal requirements to avoid infringement on due process of related amnesty hearings. At a later stage the official response to the TRC's reparation recommendations had to be delayed until the amnesty process was completed. There were also major challenges. In the South African case, victims and their advocates, including some of the TRC commissioners, lamented the fact that the TRC had no power to implement their recommendations for reparation, but had power to grant amnesty.

The TRC's limited power to implement its recommendations fostered a sense of false expectations and a charge of double standard among victims, who watched as the amnesty proceedings occurred with greater efficiency and authority. This raises different kinds of issues. One issue is whether the RRC's comparative lack of powers was inevitable, or could have been avoided by a "better-designed" RRC (e.g., by granting it some measure of implementation powers or by linking it more effectively to a post-TRC implementation process). In the latter case, it might still be argued that the two kinds of processes are inherently dissimilar:

⁴ A. du Toit, "No Rest Without the Wicked" (1997) 9 - 10.

while the amnesty hearings are quasi-judicial and issue in a verdict that resolves the issue, the debates and recommendations on reparation are part of an ongoing process which can only produce outcomes over the longer term. (Even so, the TRC could have managed better and with more finality the once-off payments eventually granted by the government). Putting the two processes together as parts of the same holistic process will thus inevitably tend to accentuate the more decisive ways in which amnesty is dealt with while reparations appear to be delayed. (This is, of course, not to deny that the two processes could and should have been managed much better together; rather it is to stress the need for better co-management). A different and more basic kind of question is whether, even with better coordination, the reparation component could ever be expected to "balance" out popular concerns with and outrage at the amnesty agreement. This must depend on the relative priorities and weighting accorded respectively to reparation and amnesty. If (in the absence of reliable data on victims' attitudes and popular opinion) we assume that popular objections to amnesty for perpetrators have a broadly similar weighting and priority as the need for reparation to victims, then it is conceivable that these could be balanced out in a well-managed process. But if, in fact, it turns out that the popular objections to amnesty and demands for retributive "justice" for perpetrators have a significantly greater weighting than the needs for reparation to victims, then even a well-managed process is not going to work. In that case, the basic mistake would lie not in the details and particularities of the reparation process, but with the basic notion that a reparation process is capable of balancing out the popular rejection of amnesty.

The origins of the comprehensive recommendations for reparation put forth by the TRC and partially implemented by the government can be traced to decisions by the R&R Committee that compensation for victims was justified, though not sufficient. In South Africa, the reparation component itself was not reduced to compensation only, but conceived more holistically as also including a range of rehabilitative, symbolic and memorialising ways. Rehabilitative and symbolic measures were considered necessary for society at large; in the form of compensation "reparation" would inevitably be limited (in the event it applied to only some 22,000 victims) in a context where many believed that the entire society had been victimized by the system of Apartheid. Even in South Africa, where the TRC held hearings for amnesty applicants on both sides and investigated human rights abuses in search of the "truth", the politics of reparation were contentious and the reparation programme problematic. This is, in part, *because* acknowledgement of wrong-doing was so intertwined with reparation and reconciliation.

4.1.1. Reparation as a Process and a Product

As explored in Chapter 2, while the international reparation debate to begin with focused on the *right* to reparation, this has increasingly shifted to the *process* by which reparation policies are determined. Thus Barkan bases his theory of restitution not on the final product but on the process: what matters is not so much

the absolute amount or form of reparation as such, but the way in which this has come to be agreed by the respective parties. Accordingly, Barkan refers to reparation as a “negotiated justice”⁵. In the description below, Barkan emphasizes restitution (i.e., reparation) in terms of a process of recognition, whereby previously disenfranchised groups are now given legitimacy, given voice, in and through the process of determining restitution:

[Restitution] underscores a milieu in which many nations and minorities see greater benefits to themselves in conducting dialogues and reconstructing shared pasts as the basis for both recognition of their identities and reconciliation. Since the desire for recognition is insatiable, restitution is a process, an ideology, but not a home. It is possible to imagine a principled end to the process of restitution but not a specific situation. For example, the restitution of indigenous rights leads to recognition of the group, which legitimises the group’s claims and leads to further discussion of new rights and to a growing inclusion of the indigenous story in the culture of the mainstream.⁶

On this perspective, the substantive outcome of reparation policies is important, since individual lives, and the dignity of those lives, are at stake after gross human rights abuses. However the eventual *substance* of the reparation programme is but one aspect to be negotiated, and in some ways that process of negotiation is as important as its outcomes. Negotiating the nature and forms of reparation is also about a process that gives voice to victims and where perpetrators or the state offer some acknowledgement of wrongdoing.

In these terms, the South African reparation process may be more positively evaluated: even if the official awards of reparation in the end did not meet the expectations that had been generated, the process itself still had a significant impact. South Africa’s holistic TRC adopted more of a bottom-up approach, whereby victims were given a public platform to talk about their needs and tell their stories, and the recommendations from the RRC arose from a consultative process involving individual victims, and victim organisations such as the Khulumani Support Group. The South African TRC was a means to discover (and make public) the truth about what had happened in the past. In doing so, and in providing a forum to listen to victims, the TRC process facilitated an official acknowledgment that the crimes of the past were abhorrent while restoring the dignity and status of victims as sources of truth and claims. This brought about a definite public awareness that such atrocities did take place and should not be allowed to happen again. Yet the victim hearings and the process of statement-taking also generated increased expectations for reparation, which were then frustrated by the delays.

This goes to show that the *process* of truth and acknowledgement is critical to the tangible deliverables in a reparation program. Otherwise the latter could have been dispensed with. A combination of *process* and *product*, whereby the process of participation in victims hearings and public consultation also serves as a

⁵ E. Barkan, *The Guilt of Nations* (2000)

⁶ Ibid. 320

dynamics of the transition; (ii) economic considerations; (iii) legal options and their connections to reparation programmes; and (iv) the reparation campaign. In the concluding paragraphs I wish to offer some recommendations for the future development and analysis of reparation programmes.

4.1. A holistic reparation programme versus piece-meal measures of reparation

In the case of South Africa, an array of individual compensation and systematic rehabilitation and re-development measures were considered in the context of a comprehensive Truth and Reconciliation Commission (TRC). In the less well-known cases of Malawi and Zimbabwe, I also considered specific reparation schemes, though these did not function in the context of more comprehensive truth and reconciliation processes. There are three key questions to consider here: (i) what are the *explanations and causes for* the official and holistic truth and reconciliation process in SA but not in other cases?; (ii) what are the *consequences of* South Africa having an official and holistic reconciliation process, but other cases not?; (iii) what were the relative *successes, limitations and shortcomings* of the different approaches in these cases. As was evident in the cases, Malawi and Zimbabwe implemented compensation schemes for a narrow set of victims and survivors, each of which held some promise of “reconciliation”, yet in both cases the successor government has refused to establish a corresponding truth-telling commission or procedures for more general symbolic or rehabilitative reparation. In this kind of transitional justice context it is not feasible and may be misconceived to attempt to limit reparation to ad hoc measures only without concomitant truth and justice processes.

In the case of South Africa, the reparation programme was part and parcel of the mandate of the TRC, which had a Reparation and Reconciliation Committee (RRC) alongside an Amnesty Committee and a Human Rights Violations Committee. The RRC made recommendations to the new government with respect to reparation for victims of gross human rights abuses. The government adopted some of their recommendations; in particular, it implemented an Urgent Interim Reparation (i.e. compensation), adopted symbolic and rehabilitative reparation initiatives and eventually approved a one-off payment of R30,000 to nearly 22,000 victims. In conjunction with these reparation measures, the TRC published its findings and held open forums at which perpetrators acknowledged and disclosed in graphic detail the human rights abuses committed. The TRC produced a seven-volume public report. As we have also seen, the reparation component of the TRC process was by no means an unqualified and resounding success. On the contrary, it was characterized by long and frustrating delays, while the final official outcomes proved a severe disappointment, especially given the great expectations which the overall TRC process had generated in the first place. In this connection, two questions must be asked. First, to what extent were the defects and disappointments of the specific reparation component due to its being bound up with the larger TRC process or can these be attributed to other and avoidable factors so that a more successful reparation could have been

means to quantify eventual awards of reparations is a better alternative than either a product approach that it is not inclusive, even if generous, or a strictly process approach that does not conclude an adequate product. In the South African case, the combination approach proved unsatisfactory because of mismanagement of expectations, of the process (which was held up by amnesty proceedings and lack of implementation powers by the TRC) and ultimately of the product, which was watered down by the ANC government.

In Zimbabwe, a reparation programme that involved greater accountability on the part of an abusive government as well as more tangible rewards to more people would, according to human rights leaders in Zimbabwe, have provided a better foundation for justice than a limited, exclusive compensation scheme. Malawi's process provided a decent but ultimately weak forum for victims to tell their stories, and dealt only casually with the issue of acknowledgment. The framers of the NCT hoped that the process of giving token compensation would also represent acknowledgment. As one well-placed interviewee remarked, "the idea of reparation may have symbolised a form of reconciliation – that people can say that at least they have gotten something out of their suffering and they can start their lives fresh again."⁷ Yet victims there did not just want greater monetary compensation; they wanted a mechanism that would expose the brutality of the Banda regime in a public forum. They were as much concerned with the deficient process of reparation as with the inadequate outcomes of that process. Providing a public forum for such a process may alleviate insecurity among victims caused by living under ostensibly democratic political rule in which persons such as the current President Muluzi once played a prominent role in the former authoritarian regime.

There is symbolic importance to how the "reparation" is made and by whom. If compensation is processed by officials in a bureaucratic process, with no acceptance that harm was done and no public acknowledgement of responsibility, as was the case in Malawi and Zimbabwe, it is likely to be of little consolation to victims. The timing, sensitivity and symbolism of the process are all important factors in the value of the program to victims. The more comprehensive a programme, the more conducive it will be for what De Greiff calls "the dynamics of inclusion and ownership behind law making".⁸ A formal reparation programme within a government-sponsored TRC, as was the case in South Africa, legitimated civil society organizations, such as Khulamani, because it established connections between government, civil society, and victims. De Greiff suggests that the dynamics of inclusion and ownership is connected to the legitimacy of the programme and its stability:

⁷ See Interview with George Kanyana, exiled during the Banda years and then elected Minister in the Ministry of Relief and Disaster Preparedness, June 2002. Provided to the author by CSV.

⁸ This is an important claim and is closely related to Barkan's theory below. According to De Greiff, "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 our rule, one that we give to ourselves (ownership), where the 'ourselves' keeps growing (inclusion). *Introduction in Handbook on Reparations* (2006) 9.

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 programme 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 reparation agreements ...⁹

Ultimately, what a comprehensive program can help accomplish – that a piecemeal approach cannot – is a process of negotiating justice between victims, perpetrators and a governing elite. While this may not necessarily result in the most effective or tangible benefits in terms of reparation as a product it is a healthy antidote to a culture of fear and impunity that impedes democratic consolidation.

4.2. Constraining and Enabling Factors to Development and Implementation

The different approaches to reparation as a mechanism of transitional justice can presumably be traced to the differences in underlying conditions and to the varying factors contributing to the development of these programmes. Implementing reparation programmes in times of political transition occurs most often within a context of heightened political and social fragility, exacerbated by budgetary constraints and by the threat of further political conflicts. Developing and implementing reparation schemes at the societal level is greatly affected by the specific social, political and economic context concerned. It is, as Vandeginste writes, extremely difficult to prescribe model solutions, first, “since they do not exist”, and, second, “since their practical implementation would depend on too many intervening factors”.¹⁰ On the basis of our case studies, I want to highlight four broad categories of enabling and constraining factors in the development, or non-development, of reparation programmes. These are (i) the political dynamics of the transition; (ii) economic considerations; (iii) legal options and their connections to reparation programmes; and (iv) the reparation campaign.

4.2.1. Political Dynamics of the Transition and its Aftermath

Reparation cannot literally make whole what has been broken. Rather, it can, as the etymology implies, aim to repair or heal the effects of the damage caused, and it can do so to a smaller or larger extent depending on the available options and the political dynamics of the transition. Accordingly, reparation may be conceived in terms of both a transitional and an ongoing policy-making process. As discussed in Chapters I and II, the nature of the political transition and the events that unfold during the process of change have a significant impact on the available options for transitional justice, including the decision to develop and implement a

⁹ Ibid., 10

¹⁰ S. Vandeginste, “Chapter 9: Reparation” in L. Huyse (ed.), *Democracy and Reconciliation in Post-Conflict States: A Handbook* (2003) 6.

particular reparation programme¹¹. In the case studies, the political dynamics under the new democratic or civilian government also shaped the formulation, development and implementation of reparation policies.

A crucial dynamic affecting the choice for, and shaping of, reparation policies during and after the transition is the extent of continuity from when the incumbents of the prior (authoritarian) regime left office to when the successor (democratic) government assumed power. The politicians who took over after political change have the responsibility of reconstructing a broken society through economic and social development while also establishing and maintaining their own reputation – and that of the new democratic order – as morally and politically superior to the prior regime. In cases where those involved in the political atrocities and human rights violations of the prior regime are clearly different from those involved in establishing the new democratic order reparation policies can unambiguously serve and mark the political transition under way. It is more complicated if key officials of the new democratic government also played prominent roles in the prior regime and were involved in political atrocities and human rights violations. Where key members of the political elite in the new democratic governments had been directly connected either to the old government (Malawi) or the liberation party and its army that was blamed for violating human rights abuses (South Africa, Zimbabwe, Namibia), the development and implementation of reparation programmes has been interfered with or affected in different ways.

In the early 1990s, Malawi changed from an autocratic dictatorship to a multi-party democracy after a two-year negotiation that culminated in an election in which a former member of the authoritarian regime assumed power. The new president and other members of the governing elite who had also been part of the prior regime wanted to avoid truth recovery and prosecution, while opposition parties, comprised mostly of former exiles, were keen on compensation programmes. It became clear that some programme aimed at compensation would be necessary to placate claims by victims, to offset court cases, and to appease the political opposition. The development and implementation of the reparation programme, however, was undermined by the political reality that the culpability of former MCP leaders and members of the former regime who were now among the governing elite had to be played down. In the circumstances, the outcome was a limited measure of compensation in the form of the National Compensation Tribunal (NCT).

In the case of Zimbabwe, the War Victims Act, which provided limited compensation to victims and families of victims of the Liberation War (1972 – 1980), was a political compromise emerging from the Lancaster House agreement (1979). The War Victims Act was considered a quid pro quo to the passage of the

¹¹ See J. Elster, “Coming to Terms with the Past: A framework for the study of justice in the transition to democracy”, *Archives Européenne Sociologique* (1998) 7 – 48. See also R. Brooks, *When Sorry Isn't Enough* (2000) 6.

Amnesty (General Pardon) Act [Chapter 9:03]¹², which exempted from criminal liability acts done in good faith before March 1980 by persons fighting on both sides during the liberation war. In so far as ZANLA and ZIPRA had been involved in extensive atrocities and abuse against civilian communities during the liberation war, they too required the amnesty provisions. The conventional wisdom in Zimbabwe was that holding perpetrators on either side accountable may have destabilized the fragile peace between white and black Zimbabweans after independence. Peace and reconciliation was a goal of both internal and external negotiators and a condition for US and UK support of the Mugabe government. The form and function of the War Victims Act was also clearly limited because of the hasty work of lawyers and politicians eager for a quick settlement. The new Zimbabwean government led by Mugabe thus committed itself to a policy of national “reconciliation” essentially based on the blanket amnesties, but not involving any truth or justice process. This left major political conflicts unresolved, not least within the new ZANU/ZAPU coalition. These internal conflicts came to a head during the disturbances in Matabeleland and the Midlands in the early 1980s which were once again resolved by a “reconciliation” between Mugabe and Nkomo based on another blanket amnesty. While issuing an amnesty for all “dissidents” - 122 of whom surrendered - and government security forces who had committed human rights violations, the government resisted any reparation program for victims out of fear of being held culpable. This effectively left the human rights abuses that had occurred unaddressed.

The negotiation process in Namibia was not dissimilar to that in Zimbabwe. As in Zimbabwe, a collection of external parties (including foreign countries and the United Nations) interested in the ramifications for the region, rather than in the consequences for the local population, brokered Namibian independence. As Melber and Saunders noted, it was a “controlled” change, managed from outside as a potential litmus test for a post-apartheid South Africa¹³. Like Zimbabwe, independent Namibia initially had a government of national unity and like Zimbabwe, a general amnesty was granted for crimes committed “for political reasons” to Namibian political and military leaders as well as to members of the South African security forces. Like ZANU, SWAPO pursued a policy of national reconciliation aimed at building a “unified country” by putting the past behind and has refused to officially acknowledge wrongdoing during the liberation struggle. Like Zimbabwe, Namibia implemented a pension program and compensation for SWAPO war veterans, but did not implement a full-scale reparation programme for victims of politically motivated violence. The lack of more comprehensive and substantial reparation programme has evidently been driven by the SWAPO government’s determination not to acknowledge and assume culpability for its own atrocities, which has left victims within its own ranks without effective recompense.

¹² See REDRESS study of Zimbabwe (date unknown), online at <http://redress.org/studies/Zimbabwe.pdf>

¹³ H. Melber and C. Saunders, *Transition in Southern Africa – Comparative Aspects* (2001) 21.

Parallel examples in South Africa of attempts to deny and avoid culpability on the part of both the former government and the ANC for atrocities during the anti-apartheid conflict are readily available. Indeed, the amnesty agreement was crucial for the negotiated political settlement enabling the democratic transition itself. Unlike Malawi, Zimbabwe and Namibia, South Africa did not only have an amnesty agreement, but also a victim-oriented truth process. What can account for this decision in the South Africa case that was not observed in the other cases? The key point of departure in the former instance is that during the negotiations leading up to the Interim Constitution, the representatives of the security forces and the governing National Party called for general amnesty, but the ANC would not budge from its opposition to amnesty for the agents of the apartheid regime (while insisting that no amnesty was required for the political violence of its own operatives in the course of the liberation struggle). Eventually, a novel kind of individual amnesty, conditional on full disclosure, was agreed to in the context of the TRC process.

Reparation was not a key issue in the TRC process, but truth-telling was closely aligned with amnesty through the innovation of individual amnesty conditional on full disclosure. In other words, the TRC was launched as a parliamentary rather than a presidential commission (unlike its models in Argentina and Chile) and involved an extensive process of public hearings, parliamentary debates and civil society involvement leading to the actual appointment of the Commission under Tutu. Broadly speaking, the South African transition, like those in Zimbabwe, Namibia and Malawi, was also a negotiated settlement that crucially involved an amnesty agreement. Unlike the other cases, though, South Africa did not stop with the amnesty but went on to include the victim-oriented truth and reparation components. This cannot be explained by the structural type of transition but rather by particular events during the transition, e.g. the intervention of civil society-based human rights initiatives proposing a truth and reconciliation process to the ANC leadership in the new Government of National Unity.

The evidence from these cases suggest that, in addition to the type of transition (as distinguished by Huntington and others), the development and implementation of specific reparation programmes are dependent on the nature of the events in the political transition, including developments involving the new democratic government. To a significant extent, political and social conditions *after* the transition influenced the development of national reparation policies. The nature of alliances during the previous liberation struggle and within the new governing alliance (consider the position of 'war veterans' in Zimbabwe and of SWAPO dissidents in Namibia) is an important political factor. The development of a policy on amnesty is generally tied to the negotiated settlement and transitional politics. The specific format or measures of reparation is dependent on the actors and interests of the new government but is influenced by the negotiation process. This was certainly the case in South Africa, but also in Malawi and Zimbabwe, where implementation, compensation schemes, victims' recordings, and infrastructure and funding was largely a function of the decisions of the new government. One of the consequences is that victims and their

advocates may have continue to push and prod the new government on the development of a programme that meets their needs long after any program has been legislated.

4.2.2. Legal Options and their relationship to reparation programmes

Public policy measures are not the only arena for seeking redress and reparation; litigation, especially in the form of civil actions, provides an alternative approach. In the case studies considered here, the development of an official reparation program occurred outside the court room, but in each case there was a relationship between the legal options (i.e., courts as avenues for redress) and what the country did to support victims through official reparation schemes. As demonstrated in Malawi with the Matchipisa Munthali case (1993), the success of civil suits in which large damages are awarded against the State can spur the State the development of an official reparation programme. Munthali's case, along with several dozen others resulting in damages awarded ranging from K40,000 into the millions, prompted a precipitous increase in High Court cases. The number of Court cases subsided in 1995, with the adoption of the new Constitution, which reserved sole jurisdiction to the NCT for civil claims by victims of human rights abuses. This has led to charges among victims and human rights leaders that the NCT was designed to prevent people from winning large settlements. Munthali, for one, commented that his "suspicion is that the NCT was established in part to prevent others from launching a civil suit against the government, as I did".¹⁴ Not only did this case have an impact on the speedy introduction of the NCT, it also shaped the scope of the NCT.

Developing official reparation programs for fear of civil suits is not necessarily a negative development, and in the longer run victims and their advocates may benefit if states pursue official reparation programs over purely court-based reparation. A government-sponsored program, with specified limits on reparation, can actually be more manageable for weaker governments than the payout of large sums to be determined by juries or judges. To some degree, this has also been a consideration in South Africa. The South African Human Rights Commission has consistently cautioned against selectivity in prosecutions of alleged perpetrators of human rights violations. It cautions that convictions would "raise victims' hopes [of large settlements] and commit resources required to finance other pressing national priorities".¹⁵ The financial implications of these cases would have been a serious, potentially unenforceable, and very unpredictable burden on the government. From a public policy perspective, an official reparation scheme like the NCT appeared as a more manageable alternative to the litigation approach.

The Namibian case shows that legal proceedings may be used as a bargaining tool by victims' advocates, though thus far there has been no clear positive impact on the reparation movement. The NSHR in Namibia

¹⁴ Interview with Matchipisa Munthali conducted by Jewel and Martin (May 3 2002).

¹⁵ See A. Boraine (2000), p. 329

believes that much is riding on the Herero Reparation Group's lawsuit against Germany. A NSHR press release asserts: "The government does not have any policy on reparation and when [the Herero] case succeeds it will force them to go in that direction"¹⁶. There is little evidence, however, to indicate that this will make a difference. In the case of South Africa, the recent court cases against international companies in United States courts by Khulumani, in conjunction with Jubilee South Africa, has not managed to bring about a more positive government response on reparations; indeed what it has actually accomplished is to get the government firmly on public record in rejecting the distinctive legal approach to claiming reparations. Even though the financial gain from those cases would overshadow the relatively small sums given out by the government, the effect on government-sanctioned reparations is speculative at best.

The case of Zimbabwe further shows that there are numerous obstacles confronting individuals in pursuing "reparations" through the legal realm. Vandeginste concluded that in times of political transition, "reparation cannot be provided effectively to a large number of victims through an exclusively judicial approach"¹⁷. There are a range of problems with such a strategy, including the problem of *de facto* impunity, whereby the police do not investigate; complications in civil court; and the massive case load. In Zimbabwe Amani Trust estimates 20,000 human rights violations alone from the 2000 elections, yet the court system would collapse if it were to bring one-fifth of those cases forward. Pursuing claims in court is expensive and the fear factor is a major impediment. According to a law professor and member of Amani Trust, pursuing reparation within the legal system is considered "impossible", as the system is "completely and utterly contaminated" and no longer able to provide justice on an objective basis, he argued¹⁸.

4.2.3. *Economic Factors*

Reparation is not merely a monetary matter, but implementing reparation programmes, whether they be purely symbolic or a combination of symbolism and compensation, requires funding. For successor governments in transition, this means weighing the benefits of resources that may be required to support reparation costs, whether through rehabilitation, community reparation or individual financial grants, with those of resources earmarked for social reconstruction, democratisation, security and so on. But, as some argue, attempts to define reparation in financial / monetary terms only obfuscate the paramount political

¹⁶ See "Namibians to Sue African Governments", Press Release by NSHR, Feb. 22, 2001

¹⁷ S. Vandeginste, "Reparation", Chapter 9 in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation After Violent Conflict: A Handbook* (2003), 151. See also H. Rombouts, *Report on Expert Seminar* (2002) 44 – 46.

¹⁸ Interview with G. (name withheld), professor of law and member, Amani Trust conducted by Shari Eppel (2002).

issues.¹⁹ How does one attach monetary value to suffering? How does one quantify the amount of reparation required?

The Southern African cases indicate that economic concerns are relevant to the development and implementation of reparation, though apparently not of ultimate importance in determining whether or not such a programme is adopted. The perceived inability of certain governments to pay for substantial reparation programmes shapes, in some measure, how and what victims and civil society organisations hope for in terms of reparation. It shapes, too, what the government officials believe is possible in terms of particular reparation schemes. It is not clear from the present research, however, that economic constraints have an overriding affect on the basic decision about whether or not reparations programmes are developed.

In Namibia, for example, government officials do not appear to have refrained from reparations because they cannot afford them (even if that is true). Nor do those pushing for reparation - and more specifically for compensation - let the reality that the government has severely depleted resources for such programmes interfere with their efforts. This reality does alter their expectations and tempers their demand for large-scale compensatory measures, however. Economic constraints also appear to influence practitioners' conceptualisation of reparation to victims in Zimbabwe. Considering that individual compensation for "secondary" and "primary" victims, either from the War of Liberation or from the Matabeleland uprisings, would conceivably bankrupt the Zimbabwean government, civil society organisations such as Amani have directed their focus toward collective reparations to whole communities -- with emphasis on development and reconstruction -- rather than on individual reparation²⁰.

Not surprisingly, the issue of economic constraint as a deterrent to the development of reparation programmes that entail individual compensation is of greater concern in Malawi, where state resources are very limited and the social needs enormous, than in South Africa, where the cost of substantial reparations would only make a relatively small dent in the national budget. In Malawi, with "potentially thousands"²¹ of claims left to be processed in addition to the almost 20,000 already reviewed, there is a daunting estimate that the amount of compensation required for payout totals K24 billion. That estimate is several times the amount that the Government can reasonably be expected to contribute from the Treasury.²² In practice, Malawi's National Compensation Tribunal has been rendered largely obsolete, given the government's

¹⁹ B. Hamber and K. Rasmussen, "Financing a Reparations Scheme for Victims of Political Violence" in B. Hamber and T. Mofokeng, "From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence" (October 2000).

²⁰ "Breaking the Silence, Building True Peace" (April 1999) 29.

²¹ Interview with NCT Chief Administrator, Mr. HS Khombe (25 February 2002).

²² D. Cammack and C. Mwale, "Reparations in Malawi, 1992 – 2001" (2003) 2

inability to pay into the Fund. Victims know that Malawi is struggling financially. They seem to know that the NCT is broke. NCT officials acknowledge that they can do little when the government does not pay²³.

In South Africa, while the potential cost factors are perceived by government and business as excessive, this need not undermine the rights of victims, according to the TRC Report²⁴. As Hamber and Rasmussen demonstrated persuasively in a comparison of reparation costs with other specific budget line items, the government's argument is weak. The TRC's recommendations for reparations would have amounted to roughly R450 million per year for six years. These costs would not, they write, "create an inordinate drain on the fiscus".²⁵ Likewise, the TRC argued, "when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment".²⁶ Evidently, the TRC's argument was not persuasive, as the government chose to fund the TRC's reparation proposals at a significantly reduced level while continuing to fund its controversial defense purchases. Such is the reality in most public policy contexts. References to the financial burden of reparation, however, can be and are used as an excuse. More generally, it is important for scholars and practitioners to distinguish between those cases where societies in fact cannot afford to prioritise reparation policies (Malawi), and those cases where such a prioritization is possible but not adopted (South Africa).

4.2.4. *The Reparation Campaign*

Brooks' assertion that "the success of any redress movement has depended more on the degree of pressure (public or private) – that is, politics – than with matters of logic, justice or culture"²⁷ holds relevance in these countries. Yet it is also clear that politicians, who may otherwise be responsive to interest group politics, are reluctant when it comes to the issue of reparation. This highlights the crucial significance of an effective civil society. Internal and external pressure, broadly defined as a reparation campaign, can certainly *affect* the development of reparation programmes. But such pressure can only have an effect in a climate where civil society organizations play a substantive role in public policy, like in South Africa. Thus, the effect of any reparation campaign depends on the political and social context of that campaign, which includes the previously established role of the advocates for reparation.

²³ Interview with NCT Chief Administrator, Mr. HS Khombe (25 February 2002).

²⁴ *TRC Report* (2003), Vol 6, Chapter 7, Sec 2, 163 found online at http://www.gov.za/reports/2003/trc/2_7.pdf

²⁵ See B. Hamber and K. Rasmussen, "Financing a Reparations Scheme for Victims of Political Violence", in B. Hamber and T. Mofokeng (eds.), *From Rhetoric to Responsibilities: Making Reparations to the Survivors of Past Political Violence*, (CSV, Oct. 2000), found online at www.csvr.org.za/papers/papr2r00.htm

²⁶ *TRC Report* (2003), Vol. 6, Chapter 7, Section 2.16, found online at http://www.gov.za/reports/2003/trc/2_7.pdf

²⁷ R. Brooks, *When Sorry Isn't Enough* (2000), 6

In the political process, civil society groups tend to represent key constituencies that often have little or no voice at the official negotiating table. Their success, therefore, depends not just on popular support or demand but on their legitimacy in the eyes of the governing elite. The relevant question here is under what kind of conditions individual victims and the advocacy groups that represent them can play what kind of roles. There were conditions (e.g. Malawi) where politically well-connected individual victims could effectively lobby for compensation in their own interests, but in the majority of cases poor and uninformed victims are not able to do that. South Africa's political dispensation is far more stable and democratic than its neighbors. As such, the reparation campaign was more advanced and arguably more successful. In the case of South Africa, the new ANC-government solicited the help of IDASA and other civil society organizations when crafting the TRC legislation²⁸. Organizations that played a key role during the process and afterwards as advocates for victims, such as CSVR and IJR, were part and parcel of the TRC process. The TRC itself was an independent organization comprised of Commissions who represented and came from a range of civil society organizations.

In the cases of Zimbabwe, and Namibia and to a lesser degree Malawi, advocates for reparation argued that there has been a culture of fear permeating political discourse, which has made it very difficult for advocacy groups to influence policy changes.²⁹ A climate of political and legal fear in Zimbabwe creates heavy responsibilities – and trying circumstances - for organisations like Zimrights and AMANI Trust. In any event, in the case of Malawi and Zimbabwe the reparation programmes were implemented by the government and without significant involvement by civil society or individual victims. The advocacy for victims, through organizations such as Zimrights and the Legal Resources Foundation, has occurred after the establishment of the War Victims Act in Zimbabwe and the National Compensation Tribunal in Malawi, not in the prior process leading up to it as was the case in South Africa. The experience in Namibia suggests that when advocacy groups (such as the Breaking the Wall of Silence Movement, the Herero Reparations Group and the National Society for Human Rights) feel disenfranchised, they will take their campaigns international in order to pressure their governments. These groups have initiated lawsuits against foreign countries and other governments as a way to spur their own government to adopt a reparation programme.

4.3. Concluding Thoughts and Recommendations

Case studies offer a unique chance to examine not only what happened but also how it happened and why it happened the way it did. As this study has shown, strategies and constraints for pursuing reparations are

²⁸ A. Boraine, *Country Unmasked* (2000) 33

²⁹ For Zimbabwe, see Interview with G. (name withheld), professor of law and member, Amani Trust conducted by Shari Eppel (2002). For Namibia, see Parlevliet, "Truth Commissions in Africa" (2000) 105. For Malawi, see K. Phiri and K. Ross, "Introduction: From Totalitarianism to Democracy in Malawi", in M. Ott, K. Phiri, K. Ross (eds.), *Democratisation in Malawi: A Stocktaking* (1998) 16.

very dependent on local contexts. A broad range of factors listed above is to be considered in deciding on whether and how reparations are to be implemented. This mini-dissertation, intended as a foundation for more detailed study, can hopefully add to the literature on reparations by also unearthing some recommendations for future development and study of reparations:

- A point of departure for any successful reparation programme is to bear in mind that reparation politics are local and that the nature and content of specific reparation policies will vary depending on the particular political, social and economic dynamics. This implies that there cannot be standardised formulas for reparation across cases; it also implies the need for inclusive negotiation. I agree with the findings of a 2002 seminar on the topic: “Instead of determining a desired outcome or result, the focus is on the agreement (consensus) that will be reached through dialogue and negotiations with all parties concerned”³⁰. Basic standards for reparation should, however, continue to be codified in international law and a matrix for best practices for the implementation of reparation should be developed.
- De Greiff’s sentiment that “all existing reparation programmes be faulted for being insufficiently comprehensive”³¹ should give caution to practitioners that every reparation program will come up against its limits as an adequate response to the needs of victims or the country’s desire for justice in times of transition. This study shows that while important, reparation policies are relatively inconsequential in the larger context of public policy in times of transition. It follows that reparation cannot be utilized in isolation as a strategy toward justice at times of transition. IDRC/ICTJ symposium participants concluded that “a free standing reparations program, devoid of links to other aspects on behalf of victims, is likely to fail. Victims may perceive monetary compensation without parallel efforts to document the truth or prosecute offenders as insincere or worse, the payment of blood money”³².
- In view of the relatively unsuccessful outcomes of the various reparation programmes in these case studies, we can learn from these cases that there is an inherent problem in the way reparation is conceptualized globally that makes it limited as a policy response. Reparation programmes should not be considered as synonymous with general reconstruction or re-development policies. Reparation can be an aim of reconstruction, but not the other way around. The purpose of reparation, and its impact, is far more limited than a comprehensive government policy that can spur institutional and systemic change and economic empowerment. Reparation it is a key element in transitional justice because it gives recognition to individual victims, whose suffering goes unnoticed. It, alone, is not justice, however.

³⁰ Report on the Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions (March 10, 2002), p. 45 - 46

³¹ Ibid. 7

³² Ibid. 3

- There is increasing government-level cooperation among countries in the region, particularly through the Southern African Development Corporation (SADC) and the African Union, and a notably increased commitment to (or at least involvement in) issues of democratic governance and human rights that usually underpin a societal commitment to addressing the past. Opportunities for civil society collaboration to use these structures and their instruments would benefit advocacy around the reparation movement. There is a further important opportunity for regional collaboration. One of the key findings of the TRC was that a large number of victims of human rights violations were actually from the Southern African region (due to destabilization and other cross-border operations by South African security forces into Mozambique, Lesotho, Zimbabwe etc) compared to those in South Africa itself. However, the TRC's reparations programme was confined to South African victims only. In effect, this means that, as long as reparation programmes are conceived in national or country terms only, a major category of victims will not qualify for reparations programmes at all. A regional initiative would accommodate a broader mandate that could provide for a larger and multi-national group of victims.
- Compensation schemes (in these contexts) are by nature insufficient. They appear to have little or no lasting impact. In the transitional justice arena, where a stable democracy, economic empowerment and the pursuit of social equality are the ultimate goals, compensation as reparation should be conceptualized and practiced as an integral part of a comprehensive process that includes some individual redress to victims (including victim involvement in the process), recommendations for symbolic and institutional changes, and identification of perpetrators of human rights abuses.
- Reparation programmes should not depend entirely on the government to implement or fund. Implementing reparation programmes in times of political transition occurs most often within a context of heightened political and social fragility, exacerbated by budgetary constraints and by possible further political conflicts. While a right to reparation should be entrenched in a new Constitution, and programmes giving effect to such a right should be able to count on state support, the implementation of such programs should either be a government/civil society collaboration or solely the responsibility of an independent body. This could take the form of a TRC that has implementation powers, or the form of a President's Fund, into which government, business and personal funds flow for the purpose of supporting reparation for victims of human rights abuses. The movement toward an international commission based at the UN that raises money for, and distributes funds, for reparation worldwide is a positive step. The ICTJ, as the leading consultative and scholarly body on transitional justice, should initiate a global fundraising campaign as part of their new reparations project to provide seed money for local reparation programmes, developed outside the sphere of government if necessary, where they are needed most.

- Further study should focus on ways to hold transitional governments accountable to the internationally established right for reparation after gross human rights abuses have occurred. Even if each situation will require a unique approach, there must be a better system for ensuring that reparatory programmes in times of transition are initiated by new governments and their civil society allies.

Reparation is now on the agenda as a key element of any transitional justice process. As this study has shown, and as Vandeginste wrote, “transitional justice in practice has reshaped the notion of reparation”³³. Reparation is not a monolithic concept or policy and cannot be applied uniformly across cases. When studied, and applied, it needs to be disaggregated in order to better understand its implications and limitations. This study has attempted to advance such a better understanding of the issue for scholars, practitioners, policy-makers and the victims of gross human rights abuses.

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³³ S. Vandeginste, Expert Seminar (2002), p. 145

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