



Volume **SIX** • Section **TWO** • Chapter **THREE**

**Report of the Reparation &  
Rehabilitation Committee**

**THE ARGUMENT FOR  
REPARATION: COMPARATIVE  
AND CUSTOMARY LAW**

# The Argument for Reparation: Comparative and Customary Law

1. Most of the many advances made over recent decades with respect to reparation policy have taken place at the level of global bodies and individual case law. More recently, however, the issue of reparations has become a matter of national significance in countries that have experienced transitions to democracy after years of repression.<sup>34</sup> For example, first in Argentina and then elsewhere in South America, a series of truth commissions were established by transitional governments with the aim of investigating human rights violations and abuses committed by predecessor regimes. The issue of reparations emerged strongly from the work of such commissions.
2. It needs to be noted that some South American governments have accepted and implemented recommendations for reparation in countries that, in many respects, face similar economic constraints to those of South Africa. Their commitment to reparation is thus of particular significance.

## Argentina

3. In May 1987, the Law of Due Obedience (Law No. 23521) created a presumption that low- and middle-ranking officers as well as most officers of higher rank acted under superior orders and duress and could not, therefore, be prosecuted for human rights abuses.<sup>35</sup> This was widely viewed as compromising the initiatives of the Argentine National Commission on the Disappeared.<sup>36</sup> In October 1989 the new President, Carlos Menem, decreed a general pardon<sup>37</sup> of military personnel and civilians convicted of military or politically-motivated crimes, and senior officers facing charges for abductions. Initially the pardon excluded certain named leaders, but it was extended in December 1989 to cover all those convicted.

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<sup>34</sup> See also this volume, Section One, Chapter Two.

<sup>35</sup> Kritz, NJ (ed), *Transitional Justice*, Vol II: Country Studies. Washington,DC: United States Institute of Peace, 1995, p. 363.

<sup>36</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 233,258.

<sup>37</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001, p. 161.

4. However, such amnesties did not preclude the possibility of victims and families of victims instituting civil claims. In addition, a number of laws were passed providing for reparations to compensate victims of human rights violations.<sup>38</sup>
- a Law No. 24 411 (Argentina, 7 December 1994) provided for monetary reparations for families of the disappeared and killed. Victims had to have been listed in the report of the National Commission on the Disappeared or have been subsequently reported to the government's Human Rights Office (which requires verification through mention in the media, a human rights report or court documents). The amount of the award was a one-time payment to the family of \$220 000 paid in state bonds. The amount was determined with reference to the civil service pay scheme and equivalent to 100 months at the salary level of the highest-paid civil servant.
  - b Law No. 23 466 (Argentina, 1987) granted a pension of \$140 per month to children of the disappeared (until they reached the age of 21 years). The estimated cost to the state of these reparations is between \$2 and \$3 billion.
  - c Law No. 24 043 (Argentina, 11 May 1994) provided monetary reparations for those imprisoned for political reasons or forced into exile. The law applied to political prisoners held without trial; those who had been 'temporarily disappeared', and whose case was reported to the media, to the truth commission or to a human rights organisation at the time, and to those arrested and sent into exile by the authorities. The award amounted to the equivalent of the daily salary rate of the highest-paid civil servant for each day the victim spent in prison or in forced exile. The award was made in a one-time payment of state bonds and could not exceed \$220 000. If the victim had died while in prison, his or her family was entitled to the same daily rate up until the date of death plus the equivalent of five years at the same rate up to a total of \$220 000. If the victim had been seriously wounded while in prison, his or her family was entitled to the daily rate plus the equivalent of 3.5 years at the same rate, up to a total of \$220 000. The estimated cost of these reparations to the state was approximately \$500 million.

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38 Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 316–17.

- d Non-monetary reparations consist of:
  - i. the creation of new legal category of ‘forcibly disappeared’, which holds the legal equivalent of death for purposes of the law (allowing the processing of wills and closing of estates) while preserving the possibility of a person’s reappearance (Law No. 24 321, Argentina, 11 May 1994);
  - ii. a waiver of military service for children of the disappeared, and
  - iii. housing credits for children of the disappeared.
  
- 5. While the law sought to compensate for the injuries suffered by unlawfully detained persons, a number of constraints prevented many individuals from benefiting in practice. For example, victims were required to corroborate a period of detention by producing an arrest order and an order of liberty (issued by the executive). However, the military government refused to acknowledge the abductions and the new government failed to obtain disclosure of many of the necessary facts required to corroborate such cases.

## CHILE

- 6. A National Commission on Truth and Reconciliation (the Chilean Commission) was set up in 1990 to account for the dead and disappeared in Chile during the period 11 September 1973 to 11 March 1990. This corresponds to the period during which the Pinochet regime ruled Chile.<sup>39</sup>
  
- 7. The Chilean Commission envisaged three aspects to reparation, namely:
  - a disclosure of the truth and the ‘end of secrecy’;
  - b recognition of the dignity of victims and the pain suffered by their relatives, and
  - c measures to improve the quality of the lives of victims.
  
- 8. While the Chilean Commission largely fulfilled the first objective of reparations – namely that of ‘ending secrecy’ and establishing the fate of victims – the third objective remained unfulfilled and the Chilean government accepted the Chilean Commission’s recommendation that specific measures be taken to compensate victims and their families. As a consequence, a National Corporation for Reparation and Reconciliation (the Chilean Corporation) was established in 1992 to see to the unfinished business of the Chilean Commission and to implement recommendations, including reparations.<sup>40</sup>

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<sup>39</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 293 & 35.

<sup>40</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001, p. 293.

9. The Law Creating the National Corporation for Reparation and Reconciliation (Law No. 19, 123, Chile, 31 January 1992) established the following benefits:<sup>41</sup> monthly pensions for the relatives of those killed or disappeared; fixed-sum payments for prison time and lost income of dependants of those who died or disappeared, health and educational benefits.<sup>42</sup>
  - a Monetary reparations included a monthly pension paid by cheque to family members of those killed or disappeared (as determined by the Chilean Commission or Corporation). If only one family member survived, the pension amounted to \$345 per month. If more than one family member survived, the pension amounted to \$481 per month, to be distributed amongst immediate family members. Family members were entitled to the pension for their lifetimes, except for children, whose pensions ended at the age 25 years. In addition to the monthly pension, family members were entitled to a one-time start-up payment of the total annual sum. The total cost to the state was \$13 million per year.
  - b Medical benefits to the families of the disappeared and killed included a monthly medical allowance (calculated at 7 % of the pension mentioned above) as well as free access to special state counselling and medical programmes. The total cost to the state was \$950 000 per year.
  - c Educational benefits to the children of the disappeared and killed included full coverage of tuition and expenses for university training up to the age of 35 years. The total cost to the state was \$1.2 million per year.
  - d Children of victims were exempted from mandatory military service.
  - e Those who had lost a state job for political reasons could reinstate their retirement pensions with lost years credited with the assistance of a special state office.
  - f Those who returned from exile abroad were eligible for a waiver of re-entry tax for vehicles.
10. The total cost of the reparations programme in the years when the greatest numbers of survivors were still alive was approximately \$16 million per year.
11. With respect to symbolic reparations, former Chilean President, Patricio Aylwin, issued a formal apology to the victims and their families on behalf of the state and requested the army to acknowledge its role in the violence.

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41 Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001, p. 317, and Kritz, NJ (ed), *Transitional Justice*, Vol III: Country Studies, Washington,DC: United States Institute of Peace, 1995,pp. 683–95.

42 Hayner, PB, *Unspeakable Truths*. New York: Routledge, 2001,pp. 314–15.

12. Despite what are generous measures by comparison with the recommendations of the South African Commission, critics of the Chilean initiative pointed out that compensation would have been greater under Chilean civil law had this course not been precluded by the 1978 amnesty decree. In terms of the decree, the former military regime headed by General Augusto Pinochet promulgated an amnesty that had the effect of awarding itself a self-imposed and unconditional immunity for criminal offences committed between 1973 and 1978. This amnesty granted to itself by the former regime – and not repealed by its successor civilian government – survived for over 20 years.<sup>43</sup>
13. Moreover, as the Chilean Commission/Corporation's mandate was confined to investigating cases of deaths and disappearances, reparations – aside from a little-known medical assistance programme – did not include survivors of imprisonment and torture.

## **HAITI, EL SALVADOR AND GUATEMALA**

14. Truth commissions in Haiti, El Salvador and Guatemala all drew up proposals for reparation.
15. In its final report, delivered in February 1996, the National Truth and Justice Commission in Haiti recommended the creation of a reparations commission to determine the 'legal, moral, and material obligations' due to victims, and suggested that funds come from the state, from national and international private donations and from voluntary contributions by the United Nations member states.<sup>44</sup>
16. The Commission on the Truth in El Salvador, established in 1992, recommended:
  - a the creation of a special fund to award 'appropriate material compensation to the victims' to be funded by the state and substantial contributions from the international community (the El Salvadorian Commission suggested that not less than 1 % of all international assistance reaching El Salvador be set aside for reparations);
  - b the creation of a national holiday in memory of the victims;
  - c the construction of a monument bearing the names of all the victims of the conflict, and
  - d recognition of the 'good name of the victims' and the 'serious crimes of which they were victims'.<sup>45</sup>

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43 See further this volume, Section One, Chapter Two.

44 Hayner, PB, *Unspeakable Truths*. New York: Routledge, 2001, p. 179.

45 Hayner, PB, *Unspeakable Truths*. New York: Routledge, 2001, pp. 179–80, 311–12.

17. The Commission for Historical Clarification in Guatemala recommended:
  - a a declaration by Congress affirming the dignity and honour of the victims;
  - b the establishment of a day of commemoration of the victims;
  - c the construction of monuments and parks in memory of the victims, and
  - d the creation of a National Reparations Programme, to be overseen by a broadly representative board, to provide moral and material reparations, psycho-social rehabilitation and other benefits.<sup>46</sup>
  
18. However, these recommendations were not taken seriously by the respective governments, nor have foreign agencies pursued recommendations that they contribute towards such reparation programmes.

## **BRAZIL AND MALAWI**

19. While neither Brazil nor Malawi instituted truth commissions following the transition from dictatorship to democracy, both countries have subsequently recognised the need to provide some form of compensation to victims of human rights abuse.
  
20. In Brazil, a reparations commission was established in 1995 to provide between US\$100 000 and US\$150 000 to the families of 135 disappeared individuals. The vast majority of the families decided to accept the money. No other benefits (pensions, health services and so on) were offered. About US\$18 million was spent by the Brazilian Commission.
  
21. Malawi's National Compensation Tribunal was established in 1996 after the 1994 multi-party elections that followed the 30-year despotic regime of Kamuzu Banda. Although the Tribunal has received over 15 500 claims, only 4566 victims had been fully compensated as of July 2001.<sup>47</sup>

## **OTHER REPARATION PROGRAMMES**

22. Payment of reparations as a consequence of war has long been a customary and/or legal obligation, generally extracted by the winning party. While historically such reparations or compensation tended to be based on collective claims, the twentieth century brought an increasing recognition of the rights of individual

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<sup>46</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 312–13.

<sup>47</sup> Africa News, 31 August,1999; *Agence France Presse*, 25 July, 2001.

victims to compensation. In 1977, one of the additional protocols added to the 1949 Geneva Convention recognised the obligation of belligerent parties to pay reparations for acts committed by members of their armed forces.<sup>48</sup>

23. This obligation should be borne in mind when considering the countries in Southern Africa, whose citizens suffered extensive violations of their human rights as a consequence of the South African conflict and whose economies were devastated by South Africa's destabilisation policy during the 1980s.

## **Reparations arising from World War II**

24. Possibly the most extensive and costly reparations programme ever was borne by the Federal Republic of Germany (West Germany) following World War II. Reparations were paid both to victims of state violence (German citizens who suffered human rights abuse at the hands of the Nazi state) and to nationals of occupied territories, the latter assuming the form of both collective and individual compensation. A Reparations Conference in Paris at the end of 1945 agreed on the principle of compensation to victims of Nazi atrocities. Since then, literally billions of Deutsche Mark (DM) have been paid.
25. Inside Germany, for example, a Federal Law on Reparation awarded damages to victims of Nazi persecution according to a range of categories. These categories included dependants of those who died as a result of political persecution, those who suffered lasting physical or mental impairment, those imprisoned or held in concentration camps and those for whom persecution resulted in loss of earning power.
26. A 1952 treaty concluded with Israel acknowledged, 'that Israel had assumed the burden of resettling many Jewish refugees'<sup>49</sup> and thus awarded Israel an amount of DM 3 000 million. Agreements with Western European nations between 1959 and 1964 provided for compensation, 'for the injury to life, health and liberty of their nationals'<sup>50</sup>. Lesser amounts were paid to Eastern European countries, including compensation for victims of pseudo-medical experiments conducted by the Nazis. Given the extensive displacement of persons as a consequence of the war, West Germany also made a contribution to the United Nations High Commission for Refugees.

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48 Geneva Convention, Article 91 of Additional Protocol 1 of 1977.

49 Shelton, D, *Remedies in International Human Rights Law*. Oxford University Press, 2001, p. 335.

50 Shelton, D, *Remedies in International Human Rights Law*, p. 335.



27. By 1988, the total sum paid by West Germany in reparations was DM 80.57 billion. Nor is this process complete, as is evidenced by the recent demand and agreement to pay compensation to victims of Nazi forced labour camps.
28. The former German Democratic Republic (GDR) has also paid reparations. While it is not known to what extent East German victims were compensated, in 1990 the GDR offered compensation to the World Jewish Congress. Japan also agreed to pay reparations, in terms of the 1951 Peace Treaty with the Allied Powers, including reparations to former prisoners of war.
29. More recently, however, reparations have been offered or demanded not just from those countries that emerged defeated, but also for those victims who suffered at the hands of the Allied Forces or even other parties. In 1988, the United States (US) agreed to compensate its own citizens and permanent residents of Japanese descent whose rights had been violated by being interned during the war. Symbolic reparations were also offered by way of an apology from the US President and Congress. Swiss banks have agreed to pay compensation to people of Jewish descent whose assets were unjustly misappropriated.

### **Other examples of reparation**

30. The following are other recent examples of reparation or calls for reparation:
31. As a result of the Gulf War in 1990, the United Nations Compensation Commission has already paid out billions of dollars in reparation to victims, including corporations and foreign governments. The revenue was obtained from levies on Israeli oil production.
32. In the Philippines, the victims of human rights abuses brought a class action suit against the estate of former President Ferdinand Marcos.<sup>51</sup> The US Federal Courts awarded compensation amounting to millions of dollars to victims of disappearances, torture and unlawful detention, for which the former President was held personally liable.
33. There was a call for reparations for the African slave trade and the consequences of European colonialism at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Durban in September 2001 (...p120)

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<sup>51</sup> Hilao v Marcos, 103 F.3d p. 767 (9 April 1996).