

Redress and the Saliency of Economic Justice

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Abstract

In the new millennium's second decade, tribunals around the world work to foster justice for the victims of major civil and human rights abuses. In doing so, they also seek to repair continuing damage to the social fabric of affected polities. That so many special tribunals—prosecutorial and reconciliatory—are now grappling with historic injustices is salutary. Long-suffering groups are starting to find their voices; global communities are beginning to listen. And human rights organizations are writing rights to redress into their operating documents. According to observers, the communities of humankind are engaging an “Age of Reconciliation.” Yet, the paths to social healing are rubble strewn. Redress initiatives for even fully acknowledged injustices face stiff opposition. Disagreements over culpability and reparative responsibility quickly arise. Even sympathetic governments plead financial incapacity. And traditional legal remedies are slow in coming and limited in reach. Moreover, the formal legal process falls far short of addressing the damage to culture, communities, education and economic and spiritual well-being—damage that persists over generations.

This essay employs a multidisciplinary “human capability” approach to extend jurisprudential concepts in order to rethink a key aspect of reparatory justice. It addresses, during economic retrenchment, the saliency of a country's promise of economic justice as a key aspect of its larger commitment to reconciliation, or social healing, for the persisting wounds of historic wrongs—wounds inflicted through systemic discrimination, denials of self-determination, violence or culture suppression. Through an examination of Peru's and South Africa's complex reconciliation initiatives, it engages the questions: What does economic justice as future capacity-building, as an integral part of a social healing initiative, look like practically on the ground—where things quickly get messy? And what happens to the mix of individual reparations and economic development when a government is threatened by financial instability? More particularly, what happens to bottom-up plans for economic justice when government and business fail to fund promised individual reparations? When plans for economic restructuring stall? When government cries of “no money” present real political obstacles to even well-conceived reconciliation plans? The essay concludes that in addition to public story-telling and allocation of responsibility, capacity-building for those most harmed through individual payments and economic restructuring and development—economic justice—may well be a key to a public sense of “reconciliation achieved”.

REDRESS AND THE SALIENCE OF ECONOMIC JUSTICE

In the new millennium's second decade, tribunals around the world work to foster justice for the victims of major civil and human rights abuses. In doing so, they also seek to repair the continuing damage to the social fabric of affected polities.¹ From the World War II Holocaust in Europe and internment of Japanese Americans in the United States to South African Apartheid and Cambodian Genocide, the twentieth century witnessed the broad-scale denigration and exclusion of outsider ethnic and cultural groups.² This systemically-rooted oppression not only badly harmed the people denigrated and excluded. It also marked mainstream societies with divisions, mistrust, ill-will and guilt. And even when direct abuse largely ended, its aftermath remained in bodily scars, damaged psyches, economic distress and broken social structures.

That so many special tribunals—prosecutorial and reconciliatory—are now grappling with historic injustices is salutary. Long-suffering groups are starting to find their voices; global communities are beginning to listen. And human rights organizations are writing rights to redress into their operating documents.³ According to observers, the communities of humankind are engaging an “Age of Reconciliation.”⁴

Yet, the paths to social healing are rubble strewn.⁵ Redress initiatives for even fully acknowledged injustices face stiff opposition. Disagreements over culpability and reparative responsibility quickly arise. Even sympathetic governments plead financial incapacity. And traditional legal remedies are slow in coming and limited in reach. Courts can award individual compensation for actual damages and order property restitution, but only after lengthy and costly litigation. Moreover, the formal legal process falls far short of addressing the damage to culture, communities, education and economic and spiritual well-being—damage that persists over generations.⁶

¹ See generally THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES (Will Kymlicka & Bashir Bashir, eds., 2008).

² See generally THE HANDBOOK OF REPARATIONS (Pablo de Greiff, ed., 2006).

³ See The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc.A/RES/60/147 (March 21, 2006).

⁴ Eric K. Yamamoto & Ashley Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to Native Hawaiian-United States and Indigenous Ainu-Japan Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 32 (2009) [hereinafter Yamamoto & Obrey, *Reframing Redress*].

⁵ See, e.g., The Extraordinary Chambers of the Courts of Cambodia [ECCC], July 26, 2010, “KAING Guek Eav alias Duch, Judgment” (Cam.), which recognized “the principles expressing the right of victims of gross violations of international human rights law to redress. . . .” (*Id.* at par. 662) (citing Articles 2(3), 9(5) and 14(6) of the ICCPR; Article 14 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 UNTS 85, Dec. 10, 1984; Article 75 of the ICC Statute; Article 24 of the United Nations Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61.177, Dec. 20, 2006, A/RES/61/177, not yet in force), but cautioned that without more power “the Chamber can merely encourage national authorities, the international community and other potential donors to show solidarity with the victims by providing financial and other forms of support that contributes to their rehabilitation, reintegration, and restoration of dignity.” *Id.* at par. 663.

⁶ Thomas Antkowiak argues that the Inter-American Court of Human Rights has done a far better job than other courts, especially the European Court of Human Rights, of implementing a range of reparations. See Thomas

This essay employs a multidisciplinary approach to extend jurisprudential concepts in order to rethink a key aspect of reparatory justice—the role of economic justice for redress initiatives aimed at reconciliation. In the past, American scholars have tended to split economic analysis (testing propositions fueled by quantitative analyses and predictive models) from democracy studies (exploring political institutions and citizenry through moral philosophy and, lately, critical theory).⁷ Legal scholars have been similarly divided. Recently, however, some in the field of law and economics have started to examine the once cast-in-stone assumption that people act privately as perfect rational wealth maximizers and that this individualistic action, if government stays out of the way, ultimately benefits all of society.⁸ They have begun to look closely at questions of fair distribution and community impact.⁹ At the same time, some democracy theorists have begun to engage what economic analysis can tell us about justice in light of institutional and group reactions to market incentives and government initiatives.

This essay emerges at this intersection. It has two parts: conceptual and illustrative. It addresses, during economic retrenchment, the salience of a country’s promise of economic justice as a key aspect of its larger commitment to reconciliation, or social healing, for the persisting wounds of historic wrongs—wounds inflicted through systemic discrimination, denials of self-determination, violence or culture suppression. Professor Yamamoto’s earlier article addressed “Social Healing Through Justice”—an approach to guiding and critiquing reconciliation initiatives that draws upon commonalities from social psychology, theology, political theory, economics, indigenous healing practices and law (including human rights).¹⁰ These commonalities inform a redress framework marked by four Rs: recognition (personal storytelling, historical excavation; assessments of power misuse); responsibility (for acts of wrongdoing and for receipt of benefits); reconstruction; and reparation.¹¹

Antkowiak, A 21st Century Mandate for International Tribunals: Victim-Centered Remedies and Restorative Justice 10-11 (2010) (on file with author) (“[T]he Inter-American Court. . . regularly orders measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition, in conjunction with compensation. . . . [in contrast], the European Court of Human Rights has historically favored granting only monetary compensation and declarative relief.”) [hereinafter Antkowiak, *A 21st Century Mandate*]. See also Thomas Antkowiak, *Remedy Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond* 46 COLUM. J. TRANSNAT’L L. 351, 357 (2008).

⁷ EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005) [hereinafter JORDAN & HARRIS].

⁸ Koushik Ghosh, *Culture, Government and Markets*, 2 FORUM ON PUBLIC POLICY ONLINE 1, 8 (2009) notes that the recent financial “crisis has opened up new admissions and an opportunity for considering well established critiques of neoclassical economics within the mainstream.”

⁹ See JORDAN & HARRIS, *supra* note 7.

¹⁰ ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL RIGHTS AMERICA* (2000).

¹¹ Eric K. Yamamoto & Ashley Obrey, *Reframing Redress*, *supra* note 4, at 32

Four commonalities emerge from diverse disciplines about the dynamics of the kind of justice that fosters social healing. The first is the embrace of the [position that] all are members of the polity, and injury to one harms the entire community; therefore healing the injured is the responsibility of all. The second is that repair must occur in two realms simultaneously--the individual (micro) and the institutional (macro). Participation in the process must be widespread, and all must see a benefit. The third commonality is that there must be material change in the socioeconomic conditions underlying reconstructed group relationships --otherwise, the dangers of “empty apologies,” “all words and no action,” “false grace,” or a

This essay does not delve further into the framework. Rather it focuses on the latter two Rs, *reconstruction* and *reparation*, in light of the significance of government's (and business') failure to take continuing affirmative steps toward economic justice as a part of their social healing commitment. One reason for our exploration is the political (and legal) relegation of "economic rights" to a lower rung on a human rights hierarchy—below "civil and political rights"¹²—and for economic justice to therefore receive short shrift politically in the implementation of reconciliation initiatives during tough financial times.¹³

To start, the economic dimension to social healing embraces reparations for harmed individuals to partially compensate for material and psychological damage.¹⁴ But it cuts far deeper. It also addresses the structural conditions that determine those individuals' life opportunities—education, job skills training, access to capital—and addresses the damage to the polity itself (the resulting social divisions, ill will, dampened productivity and diminished legitimacy).¹⁵ What are the theoretical foundations for this perspective?

Amartya Sen's "Human Capability Approach,"¹⁶ criticized by some,¹⁷ and refined by Martha Nussbaum¹⁸ and others, offers insights into the kinds of integrated individual reparations and broader economic development that shape the envisioned economic justice at the heart of many reconciliation initiatives. The capability approach avoids focus on aggregate economic indicators because an emphasis on gross wealth maximization tends to ignore the concerns of

"failure of reconciliation." The fourth commonality among the disciplines distills the other commonalities into the "Four R's" of Social Healing Through Justice: recognition, responsibility, reconstruction, and reparation.

¹² See, e.g., Maurice Cranston, *Human Rights, Real and Supposed*, in THE PHILOSOPHY OF HUMAN RIGHTS 163, 164 (Patrick Hayden ed., 2001). Cranston observes that a "philosophically respectable concept of human rights has been muddled. . . . The traditional human rights are political and civil rights. . . . What are now being put forward as universal human rights are social and economic rights. . . . [T]he new theory does not makes sense. . . . [T]he circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights." See also Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 604-05 (1995-1996) ("Sometimes writers and actors in human rights refer to 'generations' of rights, a euphemism that variously describes ranking, acceptability, or even the order in which rights "ought" to be implemented or realized [and thus] civil and political rights are regarded as 'first generation' rights while economic, social, and cultural rights are termed 'second generation' rights.").

¹³ See discussion *infra* on Peru and South Africa.

¹⁴ See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS 165 (2010) ("The classic notion of reparations today is focused on direct benefits, usually through specific financial support (or direct services) to individuals.").

¹⁵ See A GRAND DESIGN FOR PEACE AND RECONCILIATION (Yoichiro Murakami and Thomas J. Schoenbaum, eds., 2008).

¹⁶ AMARTYA SEN, DEVELOPMENT AS FREEDOM 6 (1999).

¹⁷ See S. Charusheela, *Social Analysis and the Capabilities Approach: A Limit to Martha Nussbaum's Universalist Ethics*, 33 CAMBRIDGE J. ECON. 1135 (2009) (arguing that Nussbaum's claims to universalism betrays a western bias); Lourdes Beneria, *The Crisis of Care, Globalization of Reproduction, and 'Reconciliation' Policies*, 8th International GEM-IWG Conference: Engendering Macroeconomics and International Economics (July 21, 2007) available at <http://www.econ.utah.edu/genmac/DOC/2007/2007papers/beneriapap.pdf> (arguing that Nussbaum's approach is useful "but still to general to specify" policies").

¹⁸ See Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 21 (2007) ("The most important theoretical development in human rights during the past two decades has been the elaboration of the 'Human Development Approach'...embodied in the Human Development Reports of the United Nations Development Programme annually since 1990, and in theoretical work by Amartya Sen, myself, and, by now, hundreds of young scholars in various nations.") [hereinafter Nussbaum, *Human Rights and Human Capabilities*].

society's most vulnerable segments.¹⁹ Instead, the approach focuses on qualitative aspects of life that are linked to economic development and repair for those damaged by the injustice:²⁰ decent work opportunities, health care, education, infant and foster care, political liberties, freedom from violence, ethnic and gender equality.²¹

The approach thus assesses economic activity by looking at impacts on "people one by one" and insists on first locating the purpose of "economic empowerment" in individuals' freedoms, rather than a nation's wealth.²² In doing so, the approach stresses the interrelatedness of individual freedoms and economic capacity and security, and it identifies a significant though limited role for government in altering underlying socio-economic arrangements.²³

In the context of a reconciliation initiative, the capability approach also points *reconstruction* and *reparation* toward participation by those at the bottom in shaping redress through mapping the fuller range of harms, corresponding responsibilities and possibilities for repair. In *Development As Freedom*, Sen measures the justice of a given institutional arrangement by focusing on whether the least empowered are still able to actualize their potential in ways that they find satisfying.²⁴ Nussbaum draws on Aristotelian theory to conclude that "a good political arrangement is one 'in accordance with which anyone whatsoever might do well and live a flourishing life.'"²⁵

Carlton Waterhouse underscores the importance of reframing redress away from the perpetrators and around the capacity-building needs and desires of those harmed.

[M]ost reparations schemes routinely emphasize the actions of past violators to define and evaluate reparations, thereby maintaining the continued subordination of victims and the primary importance of violators. This approach can provide past violators with an almost unilateral ability to decide, if, when, and how to

¹⁹ See Martha C. Nussbaum, *Human Capabilities, Female Human Beings* in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 62 (Martha C. Nussbaum & Jonathon Glover eds., 1996) [hereinafter Nussbaum, *Human Capabilities, Female Human Beings*].

²⁰ See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 280 (1997) ("In short, the crude approach [of considering aggregate economic wealth] does not even tell us who has the money, and thus typically gave high marks to nations such as South Africa, which contained enormous inequalities.") [hereinafter Nussbaum, *Capabilities and Human Rights*].

²¹ Nussbaum identifies ten central human capacities that individuals need to fully develop in Nussbaum, *Human Rights and Human Capabilities*, *supra* note 18, at 23-24, listing life; health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; interacting with the environment and other species; play; and political and material control over one's environment.

²² Nussbaum, *Capabilities and Human Rights*, *supra* note 20, at 285.

²³ See Sen, *supra* note 16, at 120. According to Sen, "the freedom-efficiency of the market mechanism, on the one hand, and the seriousness of freedom-inequality problems, on the other hand, are worth considering *simultaneously*. The equity problems have to be addressed, especially in dealing with serious deprivations and poverty, and in that context social intervention including governmental support may well have an important role."

²⁴ Antkowiak calls for similar action at the Inter-American Court of Human Rights.

Following a finding of liability and general objectives set out by the Court, the parties and relevant experts would discuss and devise remedies, with the facilitation of a mediator. The resulting agreement, to be approved by the Court, would lend more legitimacy to the reparations judgment, since the remedies would be ultimately formulated not by distant international judges (albeit with significant victim input), but rather by the stakeholders and experts after substantial deliberation.

Antkowiak, *A 21st Century Mandate*, *supra* note 6, at 37.

²⁵ Nussbaum, *Human Capabilities, Female Human Beings*, *supra* note 19, at 81 (citing ARISTOTLE, *POLITICS* VII:I).

make reparations, with little regard to the victims' views or role in the design and implementation of reparations programs.²⁶

Legal scholars have begun to emphasize this perspective in evaluating the economic dimensions to the anticipated and on-going work of human rights tribunals.²⁷ Priscilla Hayner notes that, “[r]ecovery may depend in part on [kind of economic] reparations awarded, and many commissions have played an important role in recommending [broad] reparations programs.”²⁸

Waterhouse and others do not diminish the role of monetary compensation in a larger reparative scheme. He emphasizes, however, that public coffers payments to individuals alone do not embody a sufficient societal commitment to reparatory justice or social healing.²⁹ Economic justice entails something more. For psychologist Judith Herman, victims/survivors value monetary payments most when those payments reflect a “sense that the people who did the damage are made to give something back, or to try to clean up the mess that they made.”³⁰

For this reason, according to Thomas Antkowiak, the Inter-American Court of Human Rights contemplates individual monetary payments as part of a package of reparative options that aim to address the diverse needs of victims of systemic abuses. The “Inter-American Court. . . regularly orders measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition, in conjunction with compensation.”³¹ This contrasts with “the European Court of Human Rights [that] has historically favored granting only monetary compensation and declarative relief.”³² Consistent with the capability approach, Antkowiak suggests that after a tribunal finds human rights violations it should shepherd through an arbitrated remedial phase that empowers victims to negotiate with government and perpetrators to shape meaningful repairs—reparatory measures that bolster former victims’ capabilities and often include both direct individual payments and broader community economic development. In that way, “[t]he resulting agreement, to be approved by the Court, would lend more legitimacy to the reparations judgment, since the remedies would be ultimately formulated not by distant international judges (albeit with significant victim input), but rather by the stakeholders and experts after substantial deliberation.”³³

With these theoretical insights as backdrop, the questions emerge: what does economic justice as future capacity-building, as an integral part of a social healing initiative, look like practically on the ground—where things quickly get messy? And what happens to the mix of individual reparations and economic development when a government is threatened by financial instability? In other words, what happens to bottom-up plans for economic justice when

²⁶ Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT’L L. 257, 267 (2009).

²⁷ HAYNER, *supra* note 14, at 166 (“beginning in 2008 a number of publications have begun to explore the link between economic development and transitional justice”).

²⁸ *Id.* at 157.

²⁹ *Id.* at 261.

³⁰ HAYNER, *supra* note 14, at 157 (citing Judith Herman, interview with Hayner).

³¹ Antkowiak, *A 21st Century Mandate*, *supra* note 6, at 10.

³² *Id.* at 11.

³³ *Id.* at 37.

government and business fail to fund promised individual reparations? When plans for economic restructuring stall? When government cries of “no money” present real political obstacles to even well-conceived reconciliation plans?

Indeed, in times of economic distress, the promise of *reparatory* payments to individuals suffering financially and emotionally (including monetary lump sums, scholarships for children, extended medical treatment fees, capital for rebuilding destroyed businesses) are often quickly forsaken.³⁴ And the *reconstruction* of key business and government practices that undergirded the injustice—both to right the wrong and to focus *reparatory* measures on future opportunities—tends to fall by the wayside.

One lesson to draw from these realities, which is teased out in the following concrete examples, is that despite a formal tribunal with extensive victim storytelling, perpetrator confessions of responsibility and investigations into causes, the failure to make promised individual payments and to restructure business and government to generate present economic benefits and future opportunities for those most harmed leads to perceptions of failed reconciliation—“just talk” and little action.³⁵ Those who say they commit to reconciliation but abandon the promise of economic justice because of “other priorities” are in effect renouncing the goal of social healing as a foundation for moving collectively forward.

Peru and South Africa provide apt, broadly drawn, illustrations.³⁶ Both countries adopted redress initiatives that embraced a capacity-building approach, viewing personal dignity, educational opportunity, political activity and economic justice as elements of the reconciliation edifice.

In the 1980s and 90s Maoist rebels in Peru and then-President Alberto Fujimori’s government clashed violently. Widespread human rights violations on all sides marked the conflict.³⁷ In 2001, an interim government established a Truth and Reconciliation Commission

³⁴ HAYNER, *supra* note 14, at 163 (“in more cases, the government has responded slowly or with tepid interest, and if a program is developed it is more limited in size and reach than envisioned by the commission”).

³⁵ YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 10, at 175.

³⁶ These illustrations are broadly drawn, without attention to nuance or other perspectives because of the brevity of the essay format.

³⁷ Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 143 (2007) [hereinafter Laplante, *On the Indivisibility of Human Rights*] (“in 1980 the self-declared Maoist group Sendero Luminoso...declared war on the state to make way for its own utopian visions. SL soon resorted to viciously violent tactics that provoked equally violent reactions from the armed forces and led to the death and disappearance of thousands of Peruvians, mostly in the rural, poor countryside”) (citing GUSTAVO GORRITI, *THE SHINING PATH* (1999)).

Initially, Shining Path sparked its violent campaign against the state in the remote rural highlands of the country, beginning what quickly degenerated into a vicious reign of terror. At first, the governmental response included a brutal counter-insurgency war led by the military, which often confused ‘Andean peasants’ with ‘terrorists,’ resulting in indiscriminate killings of this population. . . . [A]pproximately 69,280 people had been killed during the war. . . . [T]he TRC held the Sendero Luminoso responsible for fifty-four percent of the deaths reported to the RTC and the armed forces for thirty-six percent.”)

Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru’s Political Transition*, 23 AM. U. INT’L L. REV. 51, 69-70 (2007), citing *Truth and Reconciliation Commission (Peru), Final Report*, available at <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> [hereinafter TRC Final Report]; Press Release, TRC Final Report Was Made Public on August 28th at Noon (August 2003), available at <http://www.cverdad.org.pe/ingles/informacion/nprensa/notas.php?idnota=171>., at par. 13.

that conducted 40 workshops “to involve victim-survivors in determining their needs and presenting” reparations demands.³⁸ The Commission’s resulting Plan Integral de Reparaciones (“Integral Reparations Plan”) [PIR] was among “the most comprehensive reparations plans...from a truth commission process” anywhere.³⁹

The PIR not only investigated specific wrongful acts and resulting harms, it also examined deeper socio-economic causes. Its recommendations embraced individual capacity-building by targeting both individual payments for those directly injured and institutional restructuring to begin to get at the poverty roots of the conflict, including economic initiatives (starting in the poorest regions) to generate an infrastructure for education, health and jobs.⁴⁰ Hayner describes the plan as “perhaps the most widely consulted and deeply considered of all reparations programs around the world to date.”⁴¹ The reparations plan targeted the injuries sustained by direct victims (those “displaced, forcefully imprisoned, recruited by terrorist groups, tortured, raped”)⁴² but also focused on indirect victims of community violence (small businesses, students, elders). The plan aimed to help heal the self-identified wounds of the many while beginning to transform society itself.

In attempting to implement the recommendations of the Commission, however, the Peruvian government stumbled through a series of measures that have been viewed by many as inadequate and misdirected. In 2003, President Alejandro Toledo proposed a Plan de Desarrollo y Paz (Plan of Development and Peace) that provided educational benefits to the children of those most affected by the civil war.⁴³ In 2005, the Peruvian Congress passed a law that essentially incorporated all of the recommendations of the PIR, *except* for the provisions calling for individual economic reparations.⁴⁴ In the same year, an executive decree directed regional governments to use portions of their normal operating budget to implement aspects of the PIR.⁴⁵ In 2007, the Peruvian government committed new money to the PIR, establishing a 45 million Peruvian Soles fund (\$14.2 million) for education, health and economic production projects associated with the PIR.⁴⁶ The development projects, however, required victims to compete

³⁸ Laplante, *On the Indivisibility of Human Rights*, *supra* note 37, at 159.

³⁹ *Id.* at 160.

⁴⁰ Laplante, *On the Indivisibility of Human Rights*, *supra* note 37, at 160.

[The PIR’s] components include symbolic reparations, attention to physical and mental health, educational opportunities, restitution and rehabilitation of citizen rights, collective reparations and individual economic reparations. Beneficiaries of these measures include both direct and indirect victims, such as families of the disappeared and extra-judicially killed. Direct victims include those who were displaced, forcefully and/or unjustly imprisoned, recruited by terrorist groups, tortured, raped and otherwise injured.

Id. (citing Comisión de la Verdad y Reconciliación, Informe Final 2003, Vol. IX, Part 4, Ch. 2.2, *available at* <http://www.cverdad.org.pe/ifinal/index.php>).

⁴¹ Hayner, *supra* note 14, at 173.

⁴² Laplante, *supra* note 37, at 160 (citing TRC Final Report, vol. 4, Ch. 2.2).

⁴³ *Id.* at 162 (citing Mensaje Del Presidente Alejandro Toledo Sobre El Informe De La Comisión De La Verdad Y La Reconciliación (November 22, 2003), *available at* <http://www.justiciaviva.org.pe/otros/mensajepresidente.doc> (last visited Feb. 22, 2007)).

⁴⁴ *Id.* (citing Law No. 28592 (Jul. 29, 2005), *available at* <http://www.idl.org.pe/educa/PIR/28592.pdf>).

⁴⁵ *Id.* (citing Decreto Supremo N° 047-2005-PCM (July 7, 2005), *available at* <http://www.idl.org.pe/educa/PIR/047.pdf>).

⁴⁶ *Id.* at 163 (citing Reparaciones Colectivas en Abril, La Primera, Jan. 23, 2007, *available at*

(through bids) for funding, pitting those harmed against one another and creating “haves and have nots” among those who suffered.⁴⁷ Partly in response to the outcry for individual economic reparations, in 2011, the Peruvian government finally announced its plan to pay individual reparations from a \$7.1 million fund beginning in 2011.⁴⁸ But the money allocated (roughly \$100 per person) seemed to many to be too little, too late.⁴⁹

This governmental dance around economic reconstruction and reparations has led critics to charge a failing commitment to reconciliation and a likely failure of the entire social healing initiative—on the one hand, unfocused development measures with limited or delayed benefit for those harmed; on the other, minimal individual economic payments that victims need for capacity-building.⁵⁰

South Africa’s reparations scheme has faced similar criticism.⁵¹ After 40 years of economic starvation under apartheid, in line with the capability approach, South Africa’s Truth and Reconciliation Commission (TRC) embraced a kind of economic justice “geared towards developing and empowering” black South Africans.⁵² The TRC thus combined forms of reparations to address individualized harms (from detention, torture and rape) as well as apartheid’s widespread economic damage. Its final report recommended, and the country adopted, urgent interim reparations, final individual reparations, community restoration and institutional economic reforms.⁵³

Heated debate surrounded political and business reforms, particularly concerning affirmative action. To promote restructuring, the new government enacted the Black Economic Empowerment Act.⁵⁴ The Act imposed a new equity ownership requirement (to include black South Africans) for businesses contracting with the national government.⁵⁵ Yet, white South

<http://www.ednoperu.com/noticia.php?IDnoticia=37613>).

⁴⁷ *Id.*

⁴⁸ Angel Pez, *Rights-Peru: No reparations for Families of Civil War Victims*, INTERPRESS SERVICE, July 27, 2010, available at <http://ipsnews.net/news.asp?idnews=52284>.

⁴⁹ *Id.*

⁵⁰ As one redress expert observed, “development programs have a very low reparative capacity, for they do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims. In the second place, development programs are affected by a very high degree of uncertainty, for development aims are both complex and long-term.” Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 451,470-71 (Pablo de Greiff, ed., 2006).

⁵¹ Promotion of National Unity and Reconciliation Act No. 34 of 1995 (S. Afr.), synopsis (“... to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation).

⁵² Eric K. Yamamoto and Susan K. Serrano, *Assessment of Final Report of the South African Truth and Reconciliation Commission*, in *WHEN SORRY ISN’T ENOUGH* 492, 495 (Roy Brooks ed. 1998).

⁵³ *Id.*

⁵⁴ Broad-Based Black Economic Empowerment Act 53 of 2003 (S. Afr.); Land Restitution and Reform Amendment Act 18 of 1999 (S. Afr.); Skills Development Act 97 of 1998 (S. Afr.); Employment Equity Act 55 of 1998 (S. Afr.); Higher Education Act 101 of 1997 (S. Afr.); Land Reform (Labour Tenants) Act 3 of 1996 (S. Afr.); Restitution of Land Rights Act 22 of 1994 (S. Afr.).

⁵⁵ According to Waterhouse, *supra* note 26, at 289-90, its aim, and partial effect, was to “provide new opportunities to large numbers of South Africans [to] enable them to take an active role in redressing the historic discrimination of the South African employment sector through their role in staffing and managing the nation’s businesses.” “Under

Africa businesses and international contractors benefiting from apartheid retained all their past profits. Some also worried that the legislation actually benefited only a small new wealthy black business elite—not those at society’s middle and bottom.⁵⁶

The TRC had recommended holding businesses accountable for reparations because “business was central to the economy that sustained the South African state during the apartheid years.”⁵⁷ Although there were varying degrees of business involvement, the Commission found that in general businesses benefited materially from apartheid policies.⁵⁸ The Commission linked the widening gap between the rich and poor to the “historic benefit” enjoyed by apartheid businesses.⁵⁹ The Commission thus recommended corporate restitution “to those who have suffered from the effects of apartheid discrimination.”⁶⁰ The Commission also urged the “involvement of business in a wider project of reparation, relating not simply to those identified as victims by the Commission, but to all those South Africans whose normal development was impaired by the system of apartheid.”⁶¹

With this latter concern in mind, South Africa's legislature passed the Employment Equity Act aimed to “bring the [long-excluded] masses of South African[s] slowly into a range of career jobs” by way of affirmative action.⁶² Some forward progress ensued—more black South Africans working in government and some businesses. But advances were slow and for those at the bottom, largely non-existent. Legislation supporters argued that the systemic damage was far-reaching and that real economic capacity-building under the new laws and government would take a generation or more.⁶³ Others, looking from the bottom up, demanded immediate results.

the terms of this Act, companies doing business with the South African government or any organ of the state for procurement, licensing, or public-private partnerships, must diversify their equity ownership to include Blacks at levels set by the cabinet members that oversee the particular industries. . . . Along with set targets, officials use a scorecard that examines the following indicators of economic involvement: direct empowerment through ownership and control of enterprises and assets; procurement from the aforementioned designated groups; the development of enterprises involving designated groups; and corporate investment that benefits members and communities from the designated groups and other workforce-related categories.” *Id.* at 290-91.

⁵⁶ See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 69 (1997) (“This Article argues that the rights framework adopted by the Mandela government protects existing social arrangements because it is traditional and conservative. Except for largely cosmetic effects, there is little possibility that the particular conceptualization of rights in the new South Africa will alter the patterns of power, wealth, and privilege established under apartheid.”).

⁵⁷ *Truth and Reconciliation Commission of South Africa Report*, Vol. 6, Sec. 2, Ch. 5, 140 (1999).

⁵⁸ *See id.*

⁵⁹ *See id.* at 141.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² By doing so it sought “reversal of a century-long structural exclusion of these groups from gaining the training and skills required for these jobs, as well as the economic benefit of the higher salaries they provide.” Waterhouse, *supra* note 26, at 287.

⁶³ The South African courts have, themselves, acknowledged the long duration that restoration will take. Penelope E. Andrews, *Reparations for Apartheid’s Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1171-72 (2004) (citing Final Report of the TRC, vol. 5, at ch. 9 (1999)).1171-2 (“Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of

Hence, the most intense controversy focused on individual monetary reparations.⁶⁴ The South Africa Constitutional Court ruled that amnesty for perpetrators did not violate the constitutional right to sue of those harmed because of the alternative means of compensation through reparations.⁶⁵

Given the government's financial priorities,⁶⁶ however, the Mbeki administration resisted paying many individuals awarded Urgent Interim Reparations. And it paid no Final Individual Reparations—to anyone.⁶⁷ The administration cited financial constraints and other worthy projects and suggested that “because the anti-apartheid struggle was about freedom, the victims' compensation claims are money-grubbing.”⁶⁸ South Africa businesses and multinational corporations with a major presence in the country reacted with considered indifference. More than ten years after the TRC's reparation recommendations, the private sectors' contribution to national reconciliation had been abysmal. Not one South Africa corporation benefiting from apartheid had contributed to reparations for apartheid victims.⁶⁹

For these reasons, despite promises of “repair”, many who fought on the front lines against apartheid now find themselves destitute and forgotten.⁷⁰ According to a former African National Congress soldier,

[B]eing forgotten and overlooked is very painful. The government here has not followed through on its promise to look after the soldiers and activists who sacrificed their youth, their education and often their lives for the struggle. [The government and businesses] make promise after promise, but never deliver and I and my fellow forgotten soldiers are still left in poverty.⁷¹

One consequence a perception of the impending demise of the fifteen-year nation-building reconciliation project—even though it was immensely successful at fostering *recognition* and *responsibility* and served as the lynchpin for peaceful transition to democratic

strong commitment, sensitivity and labour to “reconstruct our society” so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations.”) (citing *AZAPO v President of South Africa* 1996 (4) SA 671 (CC) at 43 (S. Afr.)).

⁶⁴ *Id.* at 1164 (citing Final Report of the TRC, vol. 5, at ch. 9 (1999)).

⁶⁵ *AZAPO v President of South Africa* 1996 (4) SA 671 (CC) at 43 (S. Afr.).

⁶⁶ Concerning the limited availability of government funds in South Africa, see Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 376 (2003) (“In South Africa, as in most of the world's nations, the financial obligations of the new government are staggering, as medical care, housing, education, transportation, and other needs are of the utmost urgency for the vast majority of the population.”).

⁶⁷ The TRC identified a closed list of 22,000 individual victims. Of those, 17,000 were targeted for Urgent Interim Reparations. They and others were promised larger final payments later. *Id.*

⁶⁸ Rosemary Nagy, *Postapartheid Justice: Can Cosmopolitanism and Nation-Building Be Reconciled*, 40 LAW & SOC'Y REV. 623, 639-40 (2006).

⁶⁹ Xolani Mbanjwa, *R525m paid out since TRC started*, THE PRETORIA NEWS, July 16, 2008, available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080716062642926C223345.

⁷⁰ See Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in THE HANDBOOK OF REPARATIONS 176, 189 (Pablo de Greiff, ed., 2006) (“Almost all of the victims reported that many of those who did not receive UIR—because they were not considered urgent cases—‘became jealous or mad’, and reported increases in family and community conflicts. Often those receiving UIR informed neither their neighbors nor even their immediate family members for fear of creating conflict or having the money simply taken away.”).

⁷¹ Daly, *supra* note 66, at 369 (quoting letter from M.M. to Erin Daly (2001)).

elections. The TRC succeeded in generating a new global “truth” about the personal horrors of apartheid through cathartic victim storytelling.⁷² But, it appears, amnesty for apartheid criminal perpetrators, the government’s failure to generate funds to implement its reparations mandate and the participatory recalcitrance of businesses profiting from white apartheid rule have thus far impeded the sense of “reconciliation achieved”. Those harmed most by apartheid still struggle for daily survival while those who profited remain largely above the fray, untargeted and unapologetic.⁷³

Many now view South Africa’s economic reforms as having generated economic advances but not economic justice—and therefore as falling well short of the goal of national unity through social healing. To date, monetary reparations for apartheid victims have been woefully inadequate. Most of the Truth and Reconciliation Commission’s formal reparations recommendations await long-delayed implementation—whether for lack of government funding, corporate recalcitrance or other nations’ deference to South Africa’s sovereignty. For William Gumede and others, especially with the effects of the recent global economic recession, there will be no reconciliation in South Africa—no social healing—without economic justice.

Racial reconciliation is unlikely to take place unless it is accompanied by social justice. The fact that poverty still runs along racial lines, with blacks mostly poor, and whites mostly better off, is a real obstacle to reconciliation. Although former President Nelson Mandela initiated a far-reaching policy of reconciliation, and Mbeki in a more limited manner also, this has not been accompanied by economic reparations for those who still suffer most from the apartheid legacy of limited education, repossessing of land and property and broken families. The fact that economic inequality is run along racial lines, helps perpetuate racism. Some white South Africans appear ignorant of the continuing legacy of racial apartheid’s exclusion of blacks from education, property and advancement. They can still argue that poor blacks are in their predicament mostly because they are somehow lesser beings. South Africa’s economic downturn will increase racial tensions.⁷⁴

Facing this stark reality, new President Zuma dropped the former Mbeki administration’s hard stance against reparations assistance from other countries. Reversing course in 2010, Zuma now expressly supports a major economic reparations class action lawsuit filed by black South Africans in United States courts against the multinational corporations benefitting from

⁷² See Eric K. Yamamoto, *Race Apologies*, 1 IOWA J. GENDER RACE AND JUSTICE 47 (1997) (discussing the public impact and cathartic effect of victim storytelling).

⁷³ See *id.* at 205 (“The fight for reparations has also had the unfortunate consequence of sidelining the responsibility of other role players besides the government. The complicity of foreign corporations and governments in supporting the apartheid regime has only recently entered the discussion.”); *id.* at 199 (“Jubilee South Africa has pointed out that the multinational corporations that helped to finance the apartheid government in its final, most repressive years removed roughly R3 billion (US\$375,000,000) a year between 1985 and 1993 from the country. Jubilee argues that if 1.5 percent of those profits was returned each year for six years, financial reparations at the level of the original TRC recommendations could be paid.”).

⁷⁴ William Gumede, *Social Justice Can Heal SA*, DAILY DISPATCH, May 05, 2010, available at <http://www.dispatch.co.za/article.aspx?id=399486>.

apartheid.⁷⁵ The outcome of the lawsuit—and indeed South Africa's reconciliation initiative—is uncertain.

To conclude, on the one hand, individual reparations payments alone are almost always inadequate for healing the wounds of injustice. On the other, broad economic initiatives alone can look much like social programs that a government should be undertaking anyway.⁷⁶ Capacity-building for those most harmed through individual payments and economic restructuring and development—economic justice—may well be a key to a personal and public sense of "reconciliation achieved". In this light, one capability approach redress lesson from Peru and South Africa might be the indivisibility of individual reparations, institutional reforms and targeted economic development. A second lesson might be the significance of replacing the mantra "first economic prosperity and only then attempts at social justice," with the acknowledgment, even in financial hard times, of the salience of ground level economic justice to prospects of genuine social healing.

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