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Negotiating Reparation Rights: The Participatory and Symbolic Quotients

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NEGOTIATING REPARATION RIGHTS: THE PARTICIPATORY AND SYMBOLIC QUOTIENTS

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INTRODUCTION

With each new transitional justice experience, the centrality and importance of providing reparations to victims becomes more evident. Reparations, which include both pecuniary payments and non-pecuniary goods and services like access to health care, housing and education, are designed to respond to the material and psychological needs of victims. They do so by redressing serious harms caused by political violence and conflict as well as by signaling condemnation of the underlying crimes that caused such harm. Ethnographic research and testimonies show that victims consider reparations to be important justice measures.[1] Correspondingly, truth commissions typically recommend that governments institute reparations programs.

When governments take up these recommendations, they nevertheless face difficult implementation decisions. This reality is particularly true with regard to the distribution of individualized economic reparations as a response to widespread political violence, such as that caused by apartheid, armed conflict, repressive and authoritarian regimes, and other situations that leave a large universe of victims with diverse types of harms and suffering. Indeed, because of the extraordinary nature of such situations, governments generally opt for large scale administrative reparation programs in which a single quantum can be distributed to all qualified beneficiaries. Yet, because such a quantum is generally not tailored to individual suffering and is often significantly inferior to any civil damage award that could be expected from individual litigation, economic reparation programs always run

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1. My own extensive ethnographic research in Peru revealed that victims consistently named reparations as one of their primary justice demands. *See, e.g.*, Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228 (2007) (describing the demands for reparations made by victims).

the risk of rejection by the very population they are intended to benefit: the victim-survivors.[2]

This Article explores this contemporary problem by looking at Peru's experience with implementing a national economic reparations program. Similar to other countries like South Korea that responded to a violent past by forming truth commissions, Peru formed a Truth and Reconciliation Commission (PTRC) in 2001. It did so after twenty years of internal armed conflict between the State and illegally armed subversive groups, lasting from 1980 until 2000. As part of its post-conflict recovery effort, the PTRC presented a comprehensive plan for a national reparations program in 2003, which the government has been slowly implementing under the pressure of civil society's demands. Although the reparation program constitutes only one component of Peru's more comprehensive reconciliation efforts, it presents an important lens into the difficulties that inevitably arise in calculating a single quantum of money that adequately responds to the needs of a large and diverse set of victims and offers them a sense of feeling repaired. As will be discussed in this Article, the Peruvian government's recent proposals for an economic reparation package met with great resistance and even rejection from a large number of victim-survivors. While such difficulties can never be completely avoided, this Article proposes two ways in which the Peruvian government could have safeguarded against this worrisome outcome. These recommendations may also serve as broader principles that may guide other governments embarking on post-conflict economic reparation programs, including the government of South Korea.

First, the Peruvian government would have cultivated more buy-in to its program had it guaranteed the right to participation and ongoing consultation with the intended beneficiaries. In essence, Peru's transitional justice experience suggests that even if negotiations lead to an outcome that falls short of victims' initial expectations or what a victim could win in court, these potential plaintiffs are much more likely to accept a smaller quantum if they feel they were genuinely listened to and considered in the technical calculations.[3] Importantly, if done in a meaningful manner, the consultation process becomes a form of reparation in itself. It provides some victims their first positive interaction with the government, and can create institutional channels of democratic inclusion for those from groups that have

2. In choosing the term "victim-survivors" I mean to refer to those people who suffer direct harm from a human rights violation as well as their families. This article uses this term interchangeably with "victim" or "*los afectados*" (the Spanish term for victim-survivors of Peru's internal armed conflict) to convey the strictly legal status of someone whose legal rights were violated.

3. *See* discussion *infra* Part III.D-F.

historically been marginalized and disempowered in society. While the negotiation process should never be a charade that disregards the input of its beneficiaries and their advocates, government may discover that beneficiaries are far more reasonable in understanding that administrative programs by necessity will never match the type of damages won through litigation. I refer to this aspect of the reparation program as the "participatory quotient."

Second, while negotiations may occur with regard to the actual modality and means of distributing economic reparations, it should never compromise what I call the "symbolic quotient" of economic reparation programs: the need to acknowledge the wrongdoing and convey the State's assumption of responsibility and contrition for having caused victim harm. Even if the government is in a position to distribute generous monetary packages, if it does so without recognition of the violation of rights, the population will undoubtedly question and even reject these measures. Money alone does not symbolize an apologetic stance, but must be accompanied by statements and acts of recognition. While some may argue that compensation contains an inherent symbolic element of recognition, I contend that an explicit acknowledgment of wrongdoing is necessary to maximize the reparative effect and to prevent against outright beneficiary rejection of pecuniary measures.

This Article proceeds in four parts. Part I provides a general overview of the legal basis for the right to reparation, including the role of reparations in transitional justice and the particularly thorny set of issues that arise with respect to the individualized economic component of post-conflict reparation plans. Part II will introduce what I call essential and critical "quotients" in the design of a reparations program, namely the right to participation and the symbolic aspect of economic reparations. Part III introduces Peru's transitional justice experience and provides a critical perspective on how the Peruvian government approached the implementation of its reparations program. Specifically, it examines how Peru failed to integrate the participatory and symbolic quotients into its economic reparations program, thereby evoking major conflict and tension with its beneficiary population. Part V concludes by drawing lessons from Peru's experience that may support the fuller integration of the participatory and symbolic quotients into future economic reparation programs.

I. REPARATIONS IN TRANSITIONAL JUSTICE SETTINGS

Reparation programs have come to figure as a staple ingredient in transitional justice undertakings.[4] Priscilla Hayner comments in her recently updated authoritative text on truth commissions that only in the last decade has there been a "significant expansion in the literature on the subject of reparations."[5] This increase of attention reflects the growing recognition that reparations are not just an afterthought in the quest for justice, but rather an integral aspect of it. Nowadays countries embarking on a transitional justice path will undoubtedly need to contemplate the inclusion of reparations along with truth commissions, trials and institutional reform.

A. *The Right to Reparation*

Despite the seeming debut of reparations in the field of transitional justice, its origin in legal and political philosophy traces back to ancient Roman texts.[6] Most national jurisdictions contemplate some form of civil remedy, and international bodies have also developed extensive jurisprudence defining the parameters of reparations for measurable damages suffered by individual victims of human rights violations.[7] These legal systems embrace a fundamental principle that damages flow as a natural consequence of the violation of a legal norm, reflecting the fundamental maxim of law *ubi ius, ibi remedium* (where there is a right, there is a remedy).[8] Dinah Shelton, legal scholar and current commissioner of the Inter-American Commission on Human Rights, writes that "the most common principle in all legal systems is that a wrongdoer has an obligation to make good the injury caused, reflecting the aim of compensatory justice."[9]

In the field of human rights, most major treaties recognize that when a state violates the human rights of a person under its jurisdiction it then assumes a new obligation to repair the harm caused by its wrongful act or

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4. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 163 (2d ed. 2010).

5. *Id.*

6. D.N. MacCormick, *The Obligation of Reparations*, *in* PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 175 (1978).

7. *See generally*, Christian Tomushcat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L. & COMP. L. 157 (2002).

8. The English common law tradition of this doctrine was recognized in Marbury v. Madison, 5 U.S. 137, 163 (1803) ("[It is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.").

9. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 60 (2d ed., 2006).

omission.[10] Most notably, the U.N. General Assembly approved in 2005 the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law*, which lay out specific legal contours of the State's duty to guarantee fully this right to reparation.[11] The *Basic Principles* establish minimum standards that require remedies, including reparations, to be "adequate, effective, prompt and appropriate."[12] International tribunals also outline important minimum standards for reparations, as most readily seen in the decisions issued by the Inter-American Court ("Court"), the enforcement body of the American Convention on Human Rights.[13]

As is widely recognized, the calculation of full damages for the type of harm suffered through serious human rights violations is often impossible and impracticable.[14] Indeed, no reparation can truly amend for the type of suffering caused by the violation of such fundamental rights by government officials as the protection of life, liberty, and dignity. Despite the impossibility of accurately calculating the loss associated with serious human rights violations, courts have elaborated methods for assessing such damages, including through evidence of lost opportunities, medical costs, and other measurable losses that allow for a general calculation of an amount of

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10. *See, e.g.*, Universal Declaration of Human Rights, art. 8, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 3, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 993 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, G.A. Res. 2106, Annex, U.N. Doc. A/6014 (Dec. 21, 1965); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); Convention on the Rights of the Child, art. 39, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989). *See also* Ivcher-Bronstein v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 3-4, 135 (2001) (emphasizing the importance of an individual's right to legal recourse under the Inter-American system and within democratic society generally).

11. *See* G.A. Res. 60/147, U.N. GAOR, 60th Sess., U.N. Doc. A/60/509.

12. *See id.*, principle 2.

13. The Court's reparation jurisprudence began with its first contentious case in 1989. Velásquez-Rodríguez v. Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147 (1989). For an overview of the development of the Court's reparation jurisprudence since 1989, see generally Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008) (providing an overview of the Court's reparations decisions).

14. *See* Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 157-58 (2004) (maintaining that although monetary reparations are recognized as a remedy for human rights violations, there are few instances where victims have actually received any money).

money along with the ordered provision of other types of rehabilitation services. The jurisprudence of the Court reflects the concept of *restitutio in integrum*, which contemplates a variety of modalities to approximate making a victim whole and restoring the *status quo ante*, such as through restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[15]

While this legalized model of reparatory justice serves as a rough prototype for the design of reparations programs in transitional justice projects, ultimately these strict legal parameters must be compromised by the practical demands of transitional settings.[16] This lack of legal fidelity in transitional justice reparation programs is caused by the need to provide reparation for hundreds, if not thousands or tens of thousands, of victims, many of whom have suffered very different types of human rights harms (extrajudicial killings, disappearances, torture, displacement, and others). Simply put, individualized court proceedings are effectively impossible given the sheer number of claims and, in some countries, the existence of a corrupt or ill equipped judiciary.[17] The modality of administrative reparation plans thus now stands as the common model of transitional justice reparation processes.

B. *The Design of Administrative Reparation Plans*

Truth commissions often elaborate very general, and often overly ambitious, reparation plans with a view to providing an effective remedy to human rights victims. However, they usually leave it to the government to figure out how actually to design and implement reparation programs—a task that still wants for clear international standards as to procedures and modalities.[18] In this sense, every new experience contributes to an emerging area of international law, offering best practices and lessons learned to as-

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15. *See* Velásquez-Rodríguez, *supra* note 13, ¶ 26. For a more recent discussion, see Moiwana Cmty. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 170 (2005).

16. Professor David Gray has proposed that traditional "ordinary" tort analogies for figuring out reparations for mass atrocities is an erroneous starting point in these calculations given that the nature of the types of harms that transitional justice mechanisms seek to repair, which demand extraordinary justice. David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. UNIV. L. REV. 1043, 1095 (2010).

17. Naomi Roht-Arriaza, *Reparations in the aftermath of repression and mass violence, in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 122 (2004).

18. *See* Pablo de Greiff, *Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations, in* THE HANDBOOK OF REPARATION 1, 3, 13 (Pablo de Greiff ed., 2006) [hereinafter THE HANDBOOK] (presenting case studies of different gov-

sure that the general field develops towards a fair, equitable and just implementation of these programs.

The need for heightened attention to emerging international standards is perhaps nowhere more salient than in the process of distributing individualized economic reparations. Such distributions typically figure as one component of a comprehensive reparation plan, which includes symbolic, collective, and individualized pecuniary and non-pecuniary measures.[19] To date, the list of countries that have actually awarded economic reparations as a part of a transitional justice administrative plan is still relatively short, with Argentina and Chile being among the first.[20] South Korea is among the most recent, although its distribution plans have tended to be limited to narrow groups of beneficiaries.[21] These case studies help to highlight that some of the most immediate challenges in implementing economic reparation plans relate to three distinct determinations: the appropriate amount of payment, the set of eligible beneficiaries, and the appropriate procedure for distribution.[22]

In some respects, money payments have the closest affinity to the legal concept of civil damages in "ordinary" judicial proceedings. They require procedures and modes of determining the appropriate and best form of payment for a legal violation of a right. Yet, as mentioned already, the nature of transitional justice settings greatly complicates this process in light of the vast number of victims and types of violations. Indeed, attempting to pay money to redress a human rights violation can often generate some of the

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ernments that have implemented reparation programs and assessing the challenges that these governments have faced).

19. In choosing to focus on economic reparations, I do not wish to imply that other types of reparations, such as collective reparations, are any less valuable. This article focuses on the economic reparation experience because there are few case studies and legal analysis of this category of reparations. Elsewhere I have offered a more in-depth analysis of other forms of reparations. *See* Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141 (2007) [hereinafter *Indivisibility*]; Lisa J. Laplante & Miryam Rivera, *The Peruvian Truth Commission's Mental Health Reparations: Empowering Survivors of Political Violence to Impact the Public Health Policy*, 9 INT'L J. HEALTH & HUM. RTS. 137 (2006) [hereinafter *Mental Health Reparations*].

20. For a detailed examination of the experiences of Argentina, Chile, Brazil, Germany, Malawi, and South Africa, see THE HANDBOOK, *supra* note 18. Other countries that offered some form of economic reparations include Morocco, Colombia, Ghana and Iraq.

21. *See, e.g.*, Tae-Ung Baik, *Fairness in Transitional Justice Initiatives: The Case of South Korea*, 19 BUFF. HUM. RTS. L. REV. 169 (2013).

22. Interview with Cristian Correa, Consultant, International Center for Transitional Justice (Oct. 5, 2011) [hereinafter Interview with Correa].

thorniest of post-conflict justice issues. The *Madres de Plaza de Mayo* of Argentina, for example, denounced reparations as "blood money" on the view that they resembled payment to forget the death of their missing loved ones.[23] Destitute victims may not have the luxury of taking such principled stances, but may confuse reparation payment with development responses to poverty.[24] Indeed, a fine line often divides the use of public monies for development projects or programs to reduce poverty and monies compensating human rights violations, a confusion that elicits rejection from some victims and their advocates.[25]

Despite these lurking complications, governments must search for some appropriate indicia for calculating reparation payments. Unable to quantify the specific damages suffered by each victim who would benefit from a reparations program, public officials must select a reasonable measure that will have some semblance of relation to the normal exercise of calculating civil damages. Such a measure might, for example, reflect a civil servant pension or the average daily wage multiplied by the amount of time that passes from the initial date of victimization (to use the term in the strictly legal sense of someone who suffers a human rights violation). In many cases, it will be a lump sum uniformly distributed to all qualified victims. Whatever the case, it bears repeating that the money will never compensate fully for the harm caused by a human rights violation.[26] For

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23. Brandon Hamber & Richard Wilson, *Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies*, 1 J. HUM. RTS. 35, 45 (2002). The Asociación Madres de Plaza de Mayo (Mothers of the Plaza de Mayo) was formed by mothers of people who were 'disappeared' during the 'Dirty War' of the military dictatorship in Argentina between 1976 and 1983.

24. For an example of this occurrence, see *Indivisibility*, *supra* note 19, at 161.

25. Transitional justice scholars, this author included, have begun to focus more on the importance of development in post-conflict reconstruction efforts especially since economic inequities often underlie some of the original causes of conflict. Moreover, victims in these settings suffer from the hardship of poverty. *Id.* at 145. *See generally* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS (Pablo de Greiff & Roger Duthie eds., 2009). However, for the purposes of this article, I argue that economic reparations should remain a wholly distinct component of a reparation plan given the unique function they serve as a direct acknowledgment of human rights violations. *See* discussion *infra* Part II.B (symbolic quotient discussion).

26. Laurel Fletcher, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 19 BERKLEY J. INT'L L. 428, 431 (2001) (writing that "no market measures exist for the value of living an ordinary life"). The difficulty of measuring damages for certain types of pain and suffering has been recognized as a problem in ordinary tort law. *See, e.g.*, Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 778 (1995).

that reason, economic reparations always run the risk of being outright rejected by victim-survivors, the very population they are intended to benefit.

In light of this possibility, two essential aspects must be present, I argue, for any economic reparation program to satisfy victims, even when amounts fall short of what would be awarded using strict legal damage calculations. First, reparations programs must include what I call a "participatory quotient" that includes ongoing consultation and negotiation with victims. Second, economic reparation programs must always include what I call a "symbolic quotient" that reflects state acknowledgment of and assumption of responsibility for the harm caused. The next part offers a general explanation of these criteria.

II. CRITICAL QUOTIENTS IN THE REPARATIVE JUSTICE EQUATION

A. *The Participatory Quotient*

In general, any government's reparation program should plan for and assure the full participation of those intended to benefit from reparative measures like economic compensation. The instructive principle underlying this participatory quotient arises out of both a normative foundation and practical considerations. With regard to the former, the right to participation threads through the general field of international human rights law, especially when it concerns interests that directly impact the lives and well-being of individuals and communities. There is a growing body of scholarship by practitioners and academics espousing the importance of the right to participation in regard to special categories of persons and a wide array of activities, including displaced populations,[27] housing,[28] persons with disabilities,[29] indigenous people,[30] minorities,[31] the elderly,[32] and the environ-

27. *See, e.g.*, Jeremy Grace & Erin Mooney, *Political Participation Rights in Particular the Right to Vote, in* INCORPORATING THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTO DOMESTIC LAW: ISSUES AND CHALLENGES 507 (Walter Kälin et al. eds., 2010).

28. *See, e.g.*, Ralph Wolf, *Participation in the Right of Access to Adequate Housing*, 14 TULSA J. COMP. & INT'L L. 269, 270 (2006-07).

29. *See, e.g.*, Thorsten Afflerbach & Angela Garabagiu, *Council of Europe Actions to Promote Human Rights and Full Participation of People with Disabilities: Improving the Quality of Life of People with Disabilities in Europe*, 34 SYRACUSE J. INT'L L. & COM. 463, 464 (2007).

30. *See, e.g.*, Saeko Kawashima, *The Right to Effective Participation and the Ainu People*, 11 INT'L J. MINORITY & GROUP RTS. 21, 22 (2004).

31. *See, e.g.*, Annelies Verstichel, *Recent Developments in the UN Human Rights Committee's Approach to Minorities, with a Focus on Effective Participation*, 12 INT'L J. MINORITY & GROUP RTS. 25, 26 (2005).

ment,[33] among others. Numerous international instruments concerning human rights likewise recognize the right to participation, most notably article 21 of the Universal Declaration of Human Rights and article 25 of the International Covenant on Civil and Political Rights.[34]

Against this backdrop, the international human rights movement has begun to focus more squarely on the instrumental value of a participatory approach to the design, implementation and monitoring of policies, practices and programs that directly affect core substantive rights in vital areas of human life.[35] Professor Tara Melish, for example, has explored the importance of participation with relation to the "new governance" and "new accountability" movements, each of which recognizes participation as a critical ingredient to effective public policy making, on both instrumental and dignitary grounds.[36] These approaches are based on a view that stakeholders have a "genuine right to meaningfully influence or share control over budgetary priority-setting, substantive policy-making and assessment, resource allocation, and ensuring fair and equitable access to public goods and services."[37] In theory, effective participation results in policies and public agendas that respond better and more directly to the real needs and pri-

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32. *See, e.g.*, Sarah Moses, *A Just Society for the Elderly: The Importance of Justice as Participation*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 347-48 (2007) (discussing U.N. standards for participation of the elderly).

33. *See, e.g.*, Kerry Kumabe, *The Public's Right of Participation: Attaining Environmental Justice in Hawai'i through Deliberative Decisionmaking*, 17 ASIAN AMER. L.J. 181, 182 (2010) (discussing a civic republican model of participation); Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 47, 48 (2001).

34. *See also* African Charter on Human and Peoples' Rights, art. 13, June 27, 1981, 21 I.L.M. 58 (1982); American Convention on Human Rights, art. 23(a), Nov. 22, 1969 O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 20, 1952, 213 U.N.T.S. 262; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 7(1), June 27, 1989, 72 I.L.O. Official Bull. 59 (entered into force Sept. 5, 1991); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Dec. 21, 1998, 38 I.L.M. 517, 2161U.N.T.S. 447.

35. Martin Abregú, *Human Rights for All: From the Struggle Against Authoritarianism to the Construction of an All-Inclusive Democracy - A View from the Southern Cone and Andean Region*, 58 SUR – INT'L J. HUM. RTS. 7, 8 (2008).

36. Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1 (2010).

37. *Id.* at 74.

orities of stakeholders by taking the opinions and proposals of local populations into account.

The instrumental role of participation is indeed recognized in numerous areas of human rights law. For example, the right to participation is recognized as a first principle in assuring the realization of the right to health, enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights.[38] Interpreting that provision, the U.N. Committee on Economic, Social and Cultural Rights has recognized that meaningful participation in decision-making and monitoring processes is not only a valued right in itself, but also provides the most effective means of holding the state accountable for the fulfillment of the right to health.[39] Participation, in this regard, is viewed as increasing the populations' control over their health, allowing them to better "reach a state of complete physical, mental and social well-being."[40]

In light of the centrality of the participatory quotient in many areas of life that enjoy human rights protections, it thus comes as no surprise that the imperative of participation would figure as an important component of reparation processes in post-conflict and transitional justice settings.[41] In fact,

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38. Comm. on Econ., Soc. and Cultural Rts, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 11, U.N. Doc. E/C. 12.2000/4 (Aug. 11, 2000).

39. *Id.* ¶ 43(d).

40. *Id.* ¶ 11. The right to participation also figures into development theory. Article 1 of the Declaration on the Right to Development establishes that "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled *to participate in, contribute to, and enjoy* economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, Annex (Dec. 4, 1986) (emphasis added).

41. Due to growing attention to the importance of participation, transitional justice scholars and practitioners have recently begun to focus on the issue of local participation in transitional justice mechanisms in general, with a few narrowing in on reparations in particular. *See, e.g.*, Millar Hayli, *Facilitating Women's Voices in Truth Recovery: An assessment of women's participation and the integration of a gender perspective in truth commissions, in* LISTENING TO THE SILENCES: WOMEN AND WAR (Durham Helen & Gurd Trace eds., 2008); Lisa J. Laplante, *The Process of the Peruvian Truth Commission's Historical Memory Project: Empowering Truth Tellers to Confront Truth Deniers*, 6 HUM. RTS. J. 433 (2007) [hereinafter *Memory Project*]; Lisa J. Laplante, *Women as Political Participants: Peru's Approach to Psychosocial Post-Conflict Recovery*, 13 PEACE & CONFLICT: J. PEACE PSYCH. 313 (2007); Ezekiel Pajibo, *Civil Society and Transitional Justice in Liberia: A Practitioner's Reflection from the Field*, 1 INT'L J. TRANSITIONAL JUST. 287 (2007); Patricia Lundy & Mark McGovern, *Whose Justice: Rethinking Transitional Justice from Bottom up*, 35 J.L. SOC'Y 265 (2008); Patrick Vinck & Phuong Pham, *Ownership and Participation in Transitional*

the importance of participation was recently recognized in the 2011 report of the Secretary General of the United Nations, which declares:

> Robust national consultations are now understood to be essential prerequisites to ensure that transitional justice mechanisms reflect the needs of conflict-affected communities, including victims. There is also growing evidence that transitional justice measures that evolve over time and involve strong national ownership result in greater political stability in post-conflict settings.[42]

The report goes on to recognize that reparation programs, in particular, may be seen as a way to "strengthen victims' participation in reconstruction efforts."[43] The U.N. statement reflects the growing insistence of transitional justice advocates in stressing the utmost importance of consulting communities so they are heard in meaningful ways regarding plans for societal

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Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC, 2 INT'L J. TRANSITIONAL JUST 398 (2008); Matiangai Sirleaf, *Regional Approach to Transitional Justice? Examining the Special Court for Sierra Leone and the Truth and Reconciliation Commission for Liberia*, 21 FLA. J. INT'L L. 209 (2009); Wendy Lambourne, *Transitional Justice and Peacebuilding after Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28 (2009); Cristián Correa, Julie Guillerot & Lisa Magarrell, *Reparations and Victim Participation: A Look at the Truth Commission Experience, in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 385 (Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009); Anna Triponel & Stephen Pearson, *What Do You Think Should Happen - Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 103 (2010); Susan Harris Rimmer, *Sexing the Subject of Transitional Justice*, 32 AUST. FEMINIST L. J. 123 (2010); Emily Haslam, *Subjects and Objects: International Criminal Law and the Institutionalization of Civil Society*, 5 INT'L J. TRANSITIONAL JUST 221 (2011). While there is still limited study on the topic of participation specifically related to the design of reparation programs, the Social Science Research Council's edited volume on the role of women in reparations programs offers an excellent comparative view with a specific gender focus. *See, e.g.,* Beth Goldblatt, *Evaluating the Gender Content of Reparations: Lessons from South Africa, in* WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 48 (Ruth Rubio-Marin ed., 2006); Heidy Rombouts, *Women and Reparations in Rwanda: A Long Path to Travel, in* WHAT HAPPENED TO THE WOMEN?, *supra,* at 194; Galuh Wandita et al., *Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims, in* WHAT HAPPENED TO THE WOMEN?, *supra,* at 284.

42. U.N. Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict* Societies ¶ 18, U.N. Doc. S/2011/634 (Oct. 12, 2011) [hereinafter *Rule of Law Report*].

43. *Id.* ¶ 26.

reconstruction.[44] The general message here is that if a transitional justice mechanism is to be *for* affected populations, it must be *by* them.[45] This sentiment is especially relevant for the design and implementation of reparation programs that distribute individualized monetary reparations.[46]

As elaborated further in the next two sections, the reason participation contributes so instrumentally to the success of an economic compensation program is two-fold. On the one hand, it promotes the legitimacy of the reparation package by fostering beneficiary buy-in and willingness to compromise. On the other, it supports more macro-level, democracy building initiatives in society at large, both by helping to re-integrate formerly disenfranchised populations into the polity and by promoting better government responses to the structural inequalities that often cause conflict and political violence in the first place.

1. The Legitimizing Effect of Participation

The participatory quotient borrows its theoretical bases from the concept of deliberative democracy, an academic area that enjoys a solid body of scholarship too extensive to review here,[47] but whose focus on consultation, public participation and civic engagement should inform the evolving conversation in the transitional justice field. In particular, it is helpful to consider how participation, as a procedural method, takes as its starting point that "citizens want to have a say in matters which affect them, complemented by the policy makers' quest to *legitimate* their actions."[48] Similarly, the success of any transitional justice project rests greatly on it being perceived as legitimate by the public. As argued by Professor Jaya Ramji-

44. Donald L. Hafner & Elizabeth B. L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 94 (2007).

45. *Id.*

46. *See* Tom R. Tyler & Hulda Thorisdotir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 375-76 (2003) (noting that procedural fairness should include the participation of beneficiaries).

47. *See generally* JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000); Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307 (2003); Nancy Roberts, *Public Deliberation in an Age of Direct Citizen Participation*, 34 AM. REV. PUB. ADMIN. 315 (2004); Dennis F Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497 (2008).

48. Lyn Carson & Ron Lubensky, *Raising Expectations of Democratic Participation: An Analysis of the National Human Rights Consultation*, 33 U.N.S.W.L.J. 34, 43 (2010).

Nogales, "[i]f an institution is viewed as legitimate, actors will defer to its decisions even when they disagree with the substance of these decisions . . . ."[49] Given this reality, she recommends that the design process for transitional justice mechanisms be participatory and inclusive to increase perceptions of their legitimacy.[50] The United Nations has likewise recognized that perceptions of legitimacy constitute one of the most important factors in the overall success of transitional justice activities.[51]

With respect to reparations, the perceived legitimacy of a government's program is particularly critical because it promotes beneficiary buy-in to an economic package that will inevitably involve amounts less than could be achieved through individualized civil litigation remedies. Beneficiary buy-in in this respect can help prevent the type of outright rejection and public disavowal that would devastate any well-intentioned program. Indeed, as the case of Peru illustrates, we already have country examples in which victim-survivors rejected reparation plans that were elaborated without their input, creating political tensions that threatened the very viability of the reparation program and efforts to repair the past.[52] The participatory quotient can thus increase the likelihood that beneficiaries will ultimately accept the government's program even if it results in payments that are lower than desired or that fail to compensate fully for the actual harm suffered. In short, it enables beneficiaries to accept what might be considered "compromised justice."

This prophylactic effect of participation rests on the fact that the "purpose of dialogue is neither to attain an absolute consensus nor to reach a universal principle, but to recognize differences and similarities and to reach agreements where participants can agree, whilst still preserving their differences."[53] As active and respected participants, beneficiaries may be willing to negotiate the terms of their general right to reparation, without actually undermining the general sanctity of that right. Assuring the full, free and informed consent of beneficiaries to the negotiated content of economic reparation programs also guards against generating new harms which could potentially undermine reparative justice initiatives. That is, if victims are involved in the ongoing discussion of feasible and fair parameters for reparations, they will be more inclined to accept less than they could no-

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49. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 13 (2010).

50. *Id.* at 61.

51. *See Rule of Law Report*, *supra* note 42, at 3-4; *see also* Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 103 PACE INT'L L. REV. 22, 108 (2010).

52. *See* discussion *infra* Part IV.

53. Kawashima, *supra* note 30, at 25.

tionally win through litigation and yet not view this compromised amount as a new violation of their legal right to reparation.

2. The Reparative and Democracy Building Effect of Participation

Equally important, the process of negotiating the parameters of a compromised reparation program directly contributes to the democracy building aspects of reconstruction efforts in post-conflict settings. Indeed, a healthy democracy is one "marked by willing and active public participation."[54] Participants in democracy must develop a healthy tolerance for political contestation and bargains, "the hallmark of successful democracy."[55] In the course of developing the habits of citizenship, participation in reparation programs thus institutionalizes new channels for inclusive dialogue with affected populations, which can in turn lead to better responses to their needs. Importantly, this sensitivity to local preferences also assures that transitional justice architects do not succumb to the temptation of adopting a "one size fits all" approach, but rather craft their respective responses to the unique demands and challenges of country specific contexts.[56]

At the same time, the citizen-building aspect of the participatory quotient contains an inherent reparative effect because it recognizes and treats the formerly marginalized as equal citizens under the law, a process that can restore dignity and empower the formerly voiceless.[57] Consultation is the constitutive act that restores full citizenship. Having a role in designing a reparation program gives its beneficiaries a stake in the process while also allowing them to reclaim space to be equal and respected constituents in the public domain.[58] In this way, participation forms the cornerstone of a "transformative justice" process, promoting a cultural shift that is the true glue for holding together a new political and legal system.[59]

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54. Carson & Lubensky, *supra* note 48, at 45; *see generally* Carmen Malena, *Building Political Will for Participatory Governance: An Introduction, in* FROM POLITICAL WON'T TO POLITICAL WILL: BUILDING SUPPORT FOR PARTICIPATORY GOVERNANCE 3 (Carmen Malena ed., 2009) (regarding the importance of active public participation).

55. Marcus J. Kurtz, *The Dilemmas of Democracy in the Open Economy: Lessons from Latin America*, 56 WORLD POLITICS 263, 302 (2004).

56. *See generally* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 77 (2001-02) (warning against creating "TRC clones" and instead to focus on "contextuality" since each country's transitional path will be a "unique constellation" of a variety of social, historical and other factors) [hereinafter Daly, *Transformative Justice*]; Ramji-Nogales, *supra* note 49.

57. Lisa J. Laplante, *Evaluating Truth Commissions and Reparations through the Eyes of Victims*, 28 L'OBSERVATEUR DES NATIONS UNIES 167 (2010-11).

58. *Mental Health Reparations, supra* note 19.

59. Daly, *supra* note 56, at 100.

In this setting, using participation to address power paradigms makes particular sense considering that it is usually political and economic marginalization and disempowerment that makes certain populations more vulnerable to becoming victims of human rights violations in the first place.[60] Political violence communicates to its victims that they are less than human; that they are sub-citizens. Participatory engagement that gives meaningful voice to the historically underserved, if followed by concrete government measures, establishes some equilibrium in power relations since it can be used as a "means of building the political power required to ensure that the interests of the poor [a]re in fact adequately represented in institutional decisionmaking."[61] Assuring a sufficient participatory quotient at each stage of the design and implementation of a reparations program can thus help the historically marginalized to "cast off notions of their 'inability' or 'dependence,' and instead compel the public and government actors to see them as human beings with dignity, agency, and a drive to be treated on the basis of equal opportunity – not charity or paternalism."[62] Orchestrating opportunities to deliberate over reparation packages gives victim-survivors citizen status—that is, *voice and vote* on matters central to their lives—and ultimately constitutes a form of political restitution.

Accordingly, the participatory quotient has both instrumental and intrinsic value. As Melish notes, it can function to ensure "program adaptability and responsiveness" while also serving as a "means of building the dignity, confidence, and initiative required to sustain proactive engagement in community self-help initiatives."[63] Yet, this paradigm requires a not so easy shift in the concept of "victims" as entitled beneficiaries, especially where such victims come from marginalized and impoverished sectors. Economist Amartyr Sen has recognized that these populations are not passive and mere recipients of external decisions, but rather have the right to be active constructors of policies designed to overcome their conditions of poverty.[64] The participatory quotient thus builds off of Sen's "capability approach" by addressing the root causes of the poor's disempowerment.[65]

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60. *See id.*

61. Melish, *Maximum Feasible Participation, supra* note 36, at 21 (describing one of four primary rationales underlying "maximum feasible participation" paradigm in 1964 Economic Opportunity Act).

62. *Id.* at 14-15 (describing core aims of modern new accountability movement).

63. *Id.* at 18 (describing additional rationales for participatory paradigm in 1964 Economic Opportunity Act).

64. *See, e.g.*, AMARTYA SEN, INEQUALITY REEXAMINED 77-79 (1995) (discussing equality of opportunity and economic inequality).

65. *See generally* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 117-18 (2011).

Given that disempowerment and poverty persist after ceasefires and pose one of the greatest challenges to the very process of national recovery, implementation of the participatory quotient may be crucial to reconciliation efforts and victim repair.

B. *The Symbolic Quotient*

The participatory quotient does not, however, signify that beneficiaries should willingly bargain away their right to receive acknowledgment of the wrongs caused them by government acts and omissions. On the contrary, reparations should be accompanied by symbolic acts of contrition, such as public statements by officials recognizing that reparation payments arise out of the government's legal responsibility for rights violations.

Some view the simple act of awarding monetary compensation, even without affirmative official statements, as "a symbolic attempt to acknowledge past injustices and the suffering of victims."[66] Social scientists Roman David and Susanne Choi Yuk-ping, writing on the experience of economic reparations in the Czech Republic, for example, posit that "[m]oney symbolizes the irrevocable admission that a crime has been committed. It allows a feeling of closure."[67] This view posits that the very act of offering reparation constitutes "a clear public recognition that injustice did happen, that it should not have happened, and that it must not be forgotten."[68] On this view, the aim of pecuniary measures is not only to redress financial or material losses, "but also to provide symbolic expression of guilt and regret and to offer an unqualified and unambiguous apology to those who suffered the injustice."[69] Such emphasis on the intrinsic symbolism of monetary compensation echoes the expressive theory of law, which recognizes the value of the statement-making and symbolic utility of government legal actions.[70]

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66. Roman David & Susanne Choi Yuk-ping, *Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic*, 27 HUM. RTS. Q. 392, 404 (2005).

67. Natan Sznaider, *Money and Justice: Toward a Social Analysis of Reparations*, 3 HUM. RTS. REV. 104, 109 (2002).

68. Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L. J. 675, 728 (2008) (citing JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98 (1970)).

69. *Id.* at 728-29.

70. For more discussion on the importance of symbolism when reparation payments are inferior to what might be won in court, see Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctions: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1131 (2003) ("The law functions expressively to the extent that its role is more symbolic than instrumental, as it focuses on 'making state-

Yet, the symbolism of money payments is distinguishable from the legal category of "symbolic reparations," which includes non-pecuniary measures intended to offer dignity-restoring effects.[71] Monuments, street signs, and other memory projects fall into this general category of reparations, while apologies perhaps best epitomize the purpose of symbolic reparations.[72] Professor Frank Haldemann offers important insight into "the significance of what we might call *reparatory symbolism* as a necessary additional step toward *acknowledging* wrongdoing, breaking with an atrocity and its legacy, and thus restoring the dignity of the victims as full-fledged, equal citizens."[73] Yet, simply saying "sorry" is also not enough if there is no accompanying articulation of the reasons for such apology. Instead, a collective or institutional apology requires "acknowledg[ing] wrongdoing and thereby also acknowledg[ing] the human dignity and legitimate feelings of those wronged."[74] This ritualistic "discursive core" fulfills the symbolic quotient in a formula of economic reparations while also maximizing their reparative effect.[75]

Highlighting a symbolic quotient thus enhances the efficacy and viability of economic reparations. Sociology professor John Torpey speaks of the intertwined relationship between apology and compensation. If monetary compensation lacks explicit reference to its purpose of redressing past wrongs, it may fail to address the moral indignation of victims. In turn, they may reject the reparation program outright. At the same time, an apology may appear to be "cheap talk" if not accompanied by concrete measures,

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ments' "). For commentary more generally on the expressive function of law, see Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022, 2051 (1996); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 28 J. LEGAL STUD. 725, 760 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 592-93 (1996); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993).

71. RUTI TEITEL, TRANSITIONAL JUSTICE 125, 137 (2000).

72. Antkowiak, *supra* note 13, at 361. The Inter-American Court of Human Rights consistently orders these types of public announcements of wrongdoing at the same time that it orders governments to pay economic compensation for human rights violations.

73. Haldemann, *supra* note 68, at 730.

74. Trudy Govier & Wilhelm Verwoerd, *The Promise and Pitfalls of Apology,* 33 J. SOC. PHIL. 67 (2002).

75. Haldemann, *supra* note 68, at 727 (citing R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 79-82 (2001)).

such as reparations.[76] On the same point, scholar Elazar Barkan describes how Japan's unwillingness to admit guilt regarding its use of comfort women "depreciated the economic value of the compensation [offered] and made it valueless."[77] Any amount of economic reparations, even significant amounts, will lose their reparative value without this symbolic quotient.[78] Instead, payments may be viewed as mere humanitarian assistance, development or other types of aid wholly disconnected from the principle of corrective justice.[79]

Significantly, the symbolic quotient also contributes to macro-level reform by meeting the "requirements of legal justice" and the rule of law. It establishes victims as "equal right-bearers, who are able to make claims," thus reinforcing principles of equality before the law.[80] A "decent society," in this regard, assures that institutional practices and measures treat all subjects as members of the human community, with status of equal worth.[81] "[These] . . . symbolic gestures, or rituals, are significant as ways of expressing a society's very commitment to include the previously excluded and oppressed as fully recognized members of the polity."[82]

Indeed, it is through the process of recognition that economic reparations create a reparative effect. Haldemann explores this "phenomenology of recognition," and argues it should stand as a central principle in the transitional justice field.[83] He relies on the writings of Axel Honneth, who frames recognition as a form of justice since it meets the "human need for relations of mutual recognition as a precondition for achieving a distinctively human sense of self-realization."[84] Thus, in situations of grave human rights abuse, the moral harm caused by humiliation, disrespect, and indiffer-

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76. John Torpey, *Introduction: Politics and the Past, in* POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES 23 (John Torpey ed., 2003).

77. Haldemann, *supra* note 68, at 730 (citing ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 352 (2000)).

78. *See* Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 384 (2003) (writing on victims' negative reaction to reparations without proper acknowledgement of the harm they seek to repair).

79. *See* Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework*, 2 INT'L J. TRANSITIONAL JUST. 331, 331-33 (2008).

80. Haldemann, *supra* note 68, at 704-05. *See also* Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 332 (1999).

81. Axel Honneth, *Recognition and Moral Obligation*, 64 SOS. RES. 16, 17-18 (1997).

82. Haldemann, *supra* note 68, at 722.

83. *Id.* at 681.

84. *Id.* at 683.

ence communicates that the victim does not matter in the greater scheme of things. Trudy Govier terms this mistreatment as "misrecognition" or "non recognition,"[85] and views it as damaging to self-respect and healthy human agency; in essence it denies a person his or her very humanness. Misrecognition may continue when governments—even new regimes—maintain policies to cover up or deny past wrongdoing.[86]

Reparations which lack the symbolic quotient may thus become a new form of misrecognition. As Haldemann writes, "[o]ne obvious danger is that the perspective of the victimized, their sense of injustice or humiliation, may be ignored or not appropriately taken into account."[87] Reparations implemented in silence cause new harms: "In cases of outright denial or partial acknowledgment, the initial wound of insult and humiliation develops into 'the second wound of silence' – a deep sense of hurt stemming from the feeling that 'people condone the wrongs and do not care about the baneful results."[88] This 'second-wounding' may even undermine the critical participatory quotient elaborated in the last section since, "[w]hen recognition is withheld, victims of injustice are subjected to the symbolic injury of being ignored—of being rendered passive, powerless, voiceless, or simply invisible in matters that deeply affect them as human beings."[89] On the contrary, public acknowledgment and restoration of victims' citizen-status assures the recognition and even amends misrecognition, thereby preserving the reparative effect of economic compensation. Thus, as with the participatory quotient, I argue, beneficiaries will only accept a negotiated amount of reparation if it retains the symbolic aspect of acknowledging moral and legal responsibility for the wrongs committed, and recognition of those harmed.

The importance of both the participatory and symbolic quotients is clearly evidenced in Peru's transitional justice experience, particularly in the nation's experience with implementing economic reparations. The following Part describes that experience, demonstrating how attention to the two quotients might have increased stakeholder buy-in and avoided beneficiary rejection of the government's proposed plan.

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85. *Id.* at 693.

86. *Memory Project, supra* note 41, at 435.

87. Haldemann, *supra* note 68, at 692.

88. Trudy Govier, *What is Acknowledgement and Why is it Important? in* DILEMMAS OF RECONCILIATION: CASES AND CONCEPTS 85 (Carol A. L. Prager & Trudy Govier eds., 2003).

89. *See* J.M. Bernstein, *Suffering Injustice: Misrecognition as Moral Injury in Critical Theory*, 13 INT'L J. PHIL. STUD. 303, 311 (2005).

III. Implementing Economic Reparations in Peru: The Missing Participatory and Symbolic Quotients

A. *Peru's Transitional Justice Experience*

The possibility of transitional justice in Peru appeared suddenly in 2000 through the fortuitous flight, amidst a corruption scandal, of authoritarian leader Alberto Fujimori. The human rights community was nevertheless well poised to push this political agenda forward. In particular, even at the height of Fujimori's clamp down on Peruvian society, human rights activists had begun to formulate and articulate their demands for accountability through a truth commission.[90]

Peru formed its Truth and Reconciliation Commission in 2001 in the context of the power vacuum left by Fujimori's departure. The transitional government formed an advisory committee composed of many human rights activists, which began to map out how the government would address the massive human rights violations that occurred not only under Fujimori's dictatorial rule, but also during the internal armed conflict that began in 1980 between the government's security sector and insurgent groups. Accepting the committee's proposal of a truth commission, the government issued an executive decree establishing the Peruvian Truth and Reconciliation Commission (hereinafter "PTRC").[91]

Charged with investigating the causes, consequences, and responsibilities of political violence and the human rights violations that resulted from it, the PTRC labored for two years, presenting its Final Report in August 2003. The Report, estimating a death toll of close to 70,000 Peruvians, offers detailed information on emblematic cases of the many different types of human rights violations that occurred over the two decades falling within its mandate, including the widespread use of techniques to disappear, torture, unjustly imprison, extrajudicially kill, and massively displace populations. The Report also examines the underlying causes of Peru's internal armed conflict, including social, political, and economic inequalities that led to historical marginalization. The PTRC dedicated significant text to documenting the experience of the majority of victims, and how they came from the poorest and most marginalized sectors of society.

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90. *See* Rebecca Root, *Through the Window of Opportunity: The Transitional Justice Network in Peru*, 31 Hum. Rts. Q. 452, 465-66 (2009) (providing background on Peruvian civil society's role in the formation of a truth commission).

91. Although initially established as the Peruvian "Truth Commission," the government of President Alejandro Toledo later expanded the name of the commission to include the idea of "reconciliation."

As part of its conclusions, the PTRC recommended a comprehensive program of reparations: El Plan Integral de Reparaciones (Integral Program of Reparations or "PIR"). The team formed to elaborate the PIR did so successfully by investing substantial energy into consulting with and collecting the input of the program's future beneficiaries. For example, collaborating with human rights organizations, the team organized nineteen regional workshops that convened 846 victims to discuss their ideas about reparations.[92] As a follow-up, the team convened a national meeting, inviting victim-survivors to meet for intense all-day brainstorming sessions in which they shared what they believed would be necessary to include in a reparation program. These meetings also included open forums for the victim-survivors to dialogue with the team regarding questions, uncertainties, and even complaints about the drafting of the PIR. The team also worked closely with local non-governmental organizations who interface regularly with victims groups to gather their perceptions of the PIR and to mediate conversations with the PTRC. These efforts culminated with victims groups approving the document *Basic criteria for the design of a reparations programme in Peru*, which, in turn, formed the basis of the PIR.[93]

The team also studied the experiences of other truth commissions to get general ideas for constructing a reparation plan. In the end, the PTRC recommended one of the most comprehensive and ambitious reparation programs ever proposed. Not only did it take a very inclusive approach by integrating the many different categories of human rights violations, but also adopted a holistic approach to reparations. The PIR thus included both an economic component as well as non-pecuniary types of goods and services, such as health care, access to education and housing, and the opportunity for legal restitution, such as the clearing of false records of terrorist activity, the issuance of certificates of disappearance to enable the settlement of inheritance issues, and other legal matters. It likewise contemplated not only symbolic but also collective reparations.

With regard to economic reparations, pensions and indemnification were recommended for four priority groups of victim-survivors: widowed spouses over fifty and their children under eighteen; persons rendered partially or completely disabled (mentally or physically) due to physical violence, torture or wounding during the internal armed conflict; persons wrongly imprisoned and later found to be innocent; and victims of rape and

92. Correa et al., *supra* note 41, at 402 n. 22; Interview with Correa, *supra* note 22.

93. Interview with Correa, *supra* note 22.

their resulting offspring.[94] Despite large gaps in coverage, the selective entitlement to individualized economic reparation has nonetheless appeared to result in general acceptance among organized victims groups.[95]

Importantly, the PTRC recognized the reparative effect of the *process* of implementing the PIR. Indeed, with a mandate that included decentralization, overcoming poverty, and generating wider citizen participation as explicit goals,[96] the PTRC envisioned the PIR as a strategy for realigning the relationship between victims and the state. As its first task, it called for the participation of victim-survivors in the implementation of the PIR. The PTRC adopted this strategy as both a means and an end for addressing the underlying structural inequalities that it found contributed to the outbreak of violence. As the Commission explained in its report, the PTRC "incorporates as a basic criteria the participation of the population in decision-making and definitions of their own process of social, cultural, economic, and material construction and reconstruction."[97] In fact, through its testimony taking, as well as by convening victim-survivors to consult on the development of the PIR, the PTRC created one of the first official transitional justice experiences of direct participation of survivors. Perhaps for this reason, one tends to find a high rate of acceptance among survivors of the PIR, despite its negotiated nature.[98]

B. *Toward Implementation: Peru's Halting Uptake of the PIR*

Almost immediately following the conclusion of the PTRC's work, the government began to take piecemeal measures to implement the PIR. Individual ministers and regional governments spearheaded pilot programs in health, education and symbolic reparations. However, these efforts appeared ad hoc and not centrally planned or coordinated. In July 2005, after an extensive period of debate, the Peruvian Congress enacted an implementation law for the PIR with the objective of establishing "the normative

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94. COMISIÓN DE LA VERDAD Y RECONCILIACIÓN [PERU], INFORME FINAL Vol. IX, 190-93 (2003) [hereinafter PTRC FINAL REPORT: REPARATIONS], *available at* http://www.cverdad.org.pe/ifinal/index.php.

95. This observation is based on my own extensive field research in Peru, which included interviews with victim-survivors as well as review of their position papers. I at no time encountered outright rejection of PIR in its final form. Moreover, victims groups have relied on PIR as their lobbying platform for pushing for the passage of reparations laws, evidencing a wide acceptance of its content. Colleagues engaged in the reparations process in Peru have corroborated this general observation. *See* Correa et al., *supra* note 41, at 385; Interview with Correa, *supra* note 22.

96. PTRC FINAL REPORT: REPARATIONS, *supra* note 94, at 102.

97. *Id.* at 157-58.

98. *See supra* note 95.

framework for the [Plan] . . . in conformity with the conclusions and recommendations of the Final Report of the Truth and Reconciliation Commission."[99] The government also established a *Consejo de Reparaciones* (National Reparations Council) charged with creating an official registry of victims, *el Registro Unico*. The Reparations Council assumed the difficult task of identifying and certifying victims to determine who would be eligible for the benefits laid out in the PIR. Additionally, the government formed a high-level national commission charged with overseeing the implementation of the PIR in general, the *Comisión Multisectorial de Alto Nivel* or "CMAN."

Finally, in 2007, the new government of Alan Garcia began to implement one of the many components of the PIR: collective reparations. The President inaugurated the program from a stadium in Huanta, which had been used as a military base and where many victims met their final fate. As of the time of writing, the government had financed a little over a thousand collective reparation programs, with thousands more projects waiting approval and financing.[100] Although acknowledging the importance of collective reparations, civil society and victims groups called into question the fact that the government delayed entirely any effort to distribute individual economic reparations, also contemplated by the law. The government's most popular explanation for this omission related to the slow work of the Reparations Council in registering eligible victims. This excuse was nevertheless viewed as a pretext for lack of political will, especially since the Garcia government stopped funding the Council in 2008, eventually causing it to shut its doors until intense pressure from civil society pushed the government to resume funding. After much delay, CMAN suddenly announced in January 2011 that it was working on its plan for economic reparations, designating US$7.2 million for individual reparations.[101]

As a way of facilitating the implementation of individual economic reparations, Peru's Council of Ministers convened a "Technical Commis-

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99. Ley que Crea el Programa Integral de Reparaciones [Law Creating the Integral Program of Reparations (PIR)], Law No.28592 (Jul. 29, 2005), *available at* http://www.idl.org.pe/educa/PIR/28592.pdf.

100. For a comprehensive report detailing the history of collective reparations in Peru, as well as a preliminary evaluation of its effectiveness, see ICTJ & APRODEH, PERÚ: ¿CUÁNTO SE HA REPARADO EN NUESTRAS COMUNIDADES? AVANCES, PERCEPCIONES, Y RECOMENDACIONES SOBRE REPARACIONES COLECTIVAS EN PERÚ (2007-11) (2011), *available at* http://ictj.org/publication/per%C3%BA-%C2%BFcu%C3%A1nto-se-ha-reparado-en-nuestras-comunidades.

101. *Congreso anuncia reparaciones a víctimas de la violencia*, LA REPUBLICA, Jan. 17, 2011, *available at* http://www.larepublica.pe/17-01-2011/congreso-anuncia-reparaciones-victimas-de-la-violencia.

sion" to study how the process should proceed, an endeavor overseen by the director of CMAN. The director publically cautioned: "The amounts have to be realistic but we are not putting a price tag on life and we don't want the victims to 'sell' their loved ones . . . . We want to make viable and sustainable the payment of a forgotten debt."[102] With those words, he set the tone of the political process whose purpose was to set parameters for calculating fair economic payments that would not be rejected by beneficiaries, and yet whose quantum would necessarily fall beneath what could ordinarily be won through individual civil damages litigation.

C. *Limited Outreach to Beneficiaries*

Human rights organizations working with beneficiaries immediately recognized that the primary political fight regarding individual economic reparations would center on identifying an amount that would be as "homogeneous" as possible given the large number of victims, from different origins, with different types of claims, and all with a past experience of political and social exclusion. The CMAN director agreed that the "homogeneous" criteria should be adopted to avoid resentment. Yet agreement stopped there. A heated debate on the appropriate parameters for economic reparations ensued.

In January 2011, CMAN's Technical Commission began to convene workshops with *los afectados*, yet posed only two questions: How much do you expect in terms of economic reparations? And, what will you spend the money on? Observers expressed concern that this poll was slanted and failed to capture the "demanda organizada" because it left out the more organized groups of victim-survivors in urban centers, focusing instead on the response of (predominantly male) rural community leaders, many of whom were not even informed about the meaning of reparations.[103] Leaders of various coalitions of victims groups in Lima indicated that CMAN often refused to meet with them, citing "a full agenda" as the excuse.[104]

For many, CMAN's focus on the rural victim reinforced the image of the stereotypical victim: rural, uneducated, uninformed, and disorganized. Victims began to share stories of the hostility of CMAN. One communication complained that CMAN's director had "minimal disposition to negoti-

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102. Milagros Salazar, *Por fin llegan las reparaciones para víctimas de violencia*, INTER PRESS SERVICE, Feb. 3, 2011, *available at* www.ipsnoticias.net/print.asp?idnews=97449.

103. Email from leader of Peruvian human rights organization (Jan. 10, 2011 (7:05 p.m.)) (discussing concerns) (on file with author).

104. Email from leader of Peruvian human rights organization (Jan. 25, 2011 (9:18 a.m.)) (on file with author).

ate and consult the victims' organizations."[105] They said he even seemed to not know about their organizations. Moreover, he told them that reparations were an "administrative decision" and thus a "unilateral" decision of the state. Significantly, they acknowledged that this attitude left them feeling unrepaired and undignified, undermining the symbolic aspect of reparations.

Despite this exclusionary approach, the victims, working in coordination with local human rights organizations, remained persistent in presenting their own proposals. For example, they suggested that any package should resemble economic reparations portfolios awarded in the past, such as those granted to "Ronderos," the self-defense committees who fought in the conflict[106] or those distributed pursuant to judgments of the Inter-American Court. Such yardsticks, they asserted, would reflect the value of treating victims in a uniform, fair manner. Alternatively, they suggested a base amount reflecting the "salario vital" (minimum wage) for the duration of the twenty-year conflict.[107] CMAN's initial reaction was to declare these proposals unrealistic and "sobredimenscionada" (too extensive). The CMAN director contested the amount by pointing out that the average income of those in rural areas was much less than this amount, and that the average span of time would vary depending on when a given person's moment of "victimization" occurred.

The limited consultation with these victims groups only heightened their anxiety as they waited for the Technical Commission's report to be issued. They worried about the amount the Commission would choose, how it would be distributed, and who would benefit. In particular, they expressed concern that the Commission appeared to operate within a purely economic framework: whether there was sufficient funding in the budget. The victims noted that economics, while an important consideration, should not be the determining factor. Rather, ethical and moral principles required that reparations be "dignificatorias"—helping to restore the dignity of the beneficiary, consistent with the symbolic quotient.

CMAN finally issued its technical report toward the end of February 2011. Observing that reparation efforts are "just, necessary and appropriate for a democratic state that respects rights," the report recognized that repa-

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105. Email from leader of Peruvian human rights organization (June 2, 2011 (12:30 p.m.)) (on file with author).

106. *See generally* Jemima Garcia-Godos, *Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation*, 2 INT'L J. TRANSITIONAL JUST. 63 (2008).

107. *See El Gobierno Aprobó Aumento del Salario Mínimo Vital a 600 Soles*, EL COMERCIO, Nov. 10, 2010, *available at* http://elcomercio.pe/economia/666923/noticia-gobierno-aprobo-aumento-salario-minimo-vital-600-soles.

rations should be designed to "return the person to the situation [that existed] prior to the violation, to establish the family's social and economic life."[108] At the same time, it acknowledged that "[g]iven that it is nearly impossible to evaluate the damage suffered by each individual given the massive (widespread) victimization, we are opting for an indirect method of evaluation."[109] This direct juxtaposition of legal principle and pragmatic consideration exemplifies the typical scenario of what I call "compromised justice" in transitional justice reparation programs. It was the government's initial failure to attend to the participatory quotient in the process of determining the "content" of the right to reparation that signaled the beginning of tensions with rights-holders, who did not recognize any of their own suggestions in the government's proposals. The PIR beneficiaries did not, however, outright reject the government's proposals. Significantly, they instead began to bargain within the government's proposed parameters.

D. *Negotiating the Content of the Right to Reparation*

Victims' organizations began to meet and discuss the technical study, and whether they agreed with it or not. The general reaction of victims related to broader principles of truth and justice and the objection that the plan did not reflect their needs or demands. While there were some general pronouncements from victims' groups regarding their dissatisfaction with the report,[110] others offered more specific feedback. Some regional groups, for example, noted that they preferred one disbursement of benefits (*una sola armada*), but if budget constraints prohibited this approach they would accept fifty percent of it followed by monthly payments.[111] They rejected

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108. Lineamientos técnicos y metologias para la determinación de los montos, procedimientos y modalidades de pago que deberán regir la implementación del Programa de Reparación Económicas [Technical and methodological guidelines for determining the amounts, procedures and modalities of payment for implementing the program of economic reparations], Oficio No. 005-2011-PCM/CT (Dec. 3, 2011) [hereinafter Technical Study] (on file with author).

109. *Id.* (author's translation).

110. Beatriz Jiménez, *Keiko debe disculparse con los familiares de los asesinados por el gobierno de su padre*, EL MUNDO, Apr. 29, 2011, *available at* http://www.elmundo.es/america/2011/04/29/noticias/1304034539.html

111. Email from Peruvian lawyer working with a human rights organization (Mar. 21, 2011 (2:08 p.m.)) (on file with author). The technical study offers a few approaches to disbursement, including the provision of a single fixed amount, the offer of gradual payments, like a pension, over a period of no more than five years, or, alternatively, a lump sum of 50% followed by disbursement of the remainder in monthly payments. The report indicates that the manner of distribution would ultimately depend on the available budget. Technical Study, *supra* note 108.

any indicia that looked like anti-poverty measures, arguing that such indicia confused reparations with rural development obligations. For example, they contested the Technical Commission's reliance on a purely agrarian measure, the "Sierra productiva–el paquete tecnológico," which in essence is a measure used to address poverty and promote rural development. Amounting to 7,100 Peruvian soles (roughly $2700), it did not reflect the real cost of living in urban centers.

Victims' groups also called into question the use of "a minimum salary for an average family" ("el ingreso familiar per capita") multiplied by five years, a length of time estimated by CMAN to reflect the amount of time necessary to reestablish one's prior situation. The estimation included two years for recuperating from the immediate impact of any trauma suffered, and three years for reestablishing one's normal economic activities.[112] They questioned how the Commission determined "five" as the number of years it takes to recover from a human rights violation. Instead, they proposed a ten year time frame as the average period of "affectation"—a length they believed more closely represented their own realities. CMAN tried to justify its calculation based on its earlier polling, saying that beneficiaries indicated they would be satisfied with 10,000 soles (approximately $3,700). Yet, the victims and their advocates pointed out that in fact the majority of those polled had indicated a preferred amount in the range of 90,000 to 150,000 soles (approximately $33,600 to $56,000).[113] Significantly, the victims appeared ready to accept an amount between the two extremes.

Interestingly, none of the public announcements by victims groups seemed to outright reject the terms of the technical study; rather, they signaled a willingness to work within the government's methodology, even while being critical of it. In effect, victim groups' first response was to engage in a process of negotiation, accepting already deeply compromised parameters for reparations. Thus, even with minimal space for participation, the victims appeared sensitized to the practical limits of an administrative reparation program.

At this point the government stood at an important juncture. It could engage with victims' counter-proposals through a process of deliberative consultation and grant some concessions in the bargaining process. Certainly, the posture of victims signaled that they were amenable to compromise. While there would inevitably be some victims who would complain

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112. "Sin embargo, para efectos de intentar contabilizar la pérdida económica sufrida, se estima que al menos se requieren de cinco años para restablecer la situación previa al daño: Dos para recuperarse del impacto inmediato del trauma y tres para restablecer sus actividades económicas habituales." Technical Study, *supra* note 108.

113. Interview with Correa, *supra* note 22.

that they did not feel represented by those negotiating on their behalf, the majority appeared willing to accept compromise.

Recognizing this pivotal moment, the human rights activists accompanying the victims made a concerted effort to lobby CMAN not only to reconsider some of the technical aspects of its proposed amount, but also to guarantee that the ultimate decision would be made in full consultation with the victims. Significantly, the Reparations Council, whose only job was to register victims, issued a press release imploring CMAN to be more participatory, expressing concern that the technical study did not appear to have taken into consideration the "voz de las victimas" (voice of the victims), who should be fully involved in developing the criteria for reparations used to calculate amounts, procedures and modalities of economic reparations.[114] The Council pointed out that "consultation and victim acceptance" is "a process that has a truly reparative effect and which will be viewed as legitimate by the affected population."[115]

E. *Missed Opportunity Spells Rejection*

Ultimately, CMAN failed to seize the moment and take a turn toward meaningful consultation with the victims. According to victims' reports, the CMAN director reacted with hostility, outright rejecting counter-offers while arguing that reparations were not obligatory and the amounts were not up for debate given that they reflect an administrative decision. He also said the only reason victims would receive reparations at all was thanks to his underappreciated efforts.[116] His response deflated the notion that victims should be treated as equal citizens and rights bearers, and instead were at the whim of a paternalistic benefactor. One victim leader described a meeting with the CMAN director involving fifteen representatives of twelve regions, reporting that "fuimos ninguneados," an idiomatic expression conveying the sense of being made to feel like "nobodies."[117]

The CMAN director went so far as to make an unsavory comparison, pointing out that a victim's life would not have improved even if there had been no violation. For example, a child whose parents were killed or disappeared would be in the same condition as his neighbor who suffered no

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114. Consejo de Reparaciones, *Consejo de Reparaciones emite opinión sobre la propuesta de reparaciones económicas*, Oficio No. 027-2011-PCM-CR/P (Apr. 1, 2011), *available at* http://www.ruv.gob.pe/noticias_104.html.

115. "La consulta y aceptación de las víctimas" es "un proceso con un efecto realmente reparador y que goce de legitimidad entre la población afectada." *Id.*

116. Interview with victim (Hartford, CT, U.S.A.) (Oct. 12, 2011).

117. Email from leader of a victim-survivor group in Peru (June 8, 2011 (5:33 p.m.)) (on file with author).

such loss in the war. His comment implied that even if the victims had the opportunity to present evidence of incurred losses they would often lack proof of deserving reparations. This comment reflects a profound lack of appreciation of the symbolic import of reparations—the importance of recognizing not only the responsibility of the State, but also the mental suffering that victims endured, which may not be neatly presented in receipts and absent pay slips. Perhaps most significant is how the CMAN director failed to appreciate how the very process of negotiating reparations is a symbolic form of reparations.

F. *The Wait for Reparative Justice*

Given that CMAN's proposals did not reflect their demands, the victims viewed them as lacking legitimacy. Moreover, they saw the amounts as reflecting new forms of discrimination. Given the overall situation, the victims decided to stop negotiating altogether, and wait it out until the next government. Indeed, when it became evident that there was no room for negotiating with the incumbent president's administration, victims' organizations took the approach of redirecting their lobbying actions toward the impending presidential elections. This included writing letters to candidates, especially to Ollanta Humala, whose party was one of the few to mention the subject of reparations in his written platform.

Despite the strategic plan to outwait the government, the incumbent administration had its own trick up its sleeve: President Garcia announced that his government would soon begin to pay reparations to those who had suffered "as a result of terrorism."[118] This descriptive terminology reflected a decision to disassociate reparations with state responsibility for human rights violations, understanding them instead as a gesture of help for those unfortunate enough to be negatively impacted by terrorism. Immediately, the symbolic importance of acknowledgment was lost.

Significantly, the Reparations Council sent a letter to one victim leader in what could only be viewed as an attempt to apologize for the overall reparation process.[119] In this public letter, the Council refers to the importance of coordinating with victims, recognizing that the regulations issued to implement the PIR law themselves embody the principle of participation. Article 7 of the regulations indeed recognize the right of victims to participate "in the decision-making and definition of their own processes of social,

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118. *Alan García: Apoyaré al próximo gobierno porque es mi obligación'*, EL COMERCIO, June 2, 2011, *available at* http://elcomercio.pe/politica/767733/noticia-alan-garcia-apoyare-al-proximo-gobierno-porque-mi-obligacion.

119. Letter from Consejo de Reparaciones, Oficio No. 043-2011-PCM-CR/P, to victim leader (June 8, 2011) (on file with author).

cultural, economic and material construction and reconstruction, through a process of dialogue and consultation that assumes the incorporation and development of the involved population."[120] The Council rightly recognized that ongoing and meaningful consultation with victim-survivors is not only required by law, but also presents an important opportunity to include a historically excluded population in political decisions.[121]

In June 2011, the government issued a resolution to begin the reparation process. It declared that each victim would be entitled to 10,000 soles, and that the registration process would officially close at the end of December 2011.[122] The rejection by victims' organizations was immediate and unequivocal. They began sending out signed letters uniformly rejecting the resolution, calling it an insult and, as one victim-rights activist termed it, "[l]a degradación como reparación" (degradation as reparation).[123] Such groups viewed the government as plenty generous with big businesses, giving them all kinds of strategic subsidies, yet offering individual economic reparations for human rights violations that are "an insult to the dignity of victims."[124] It was even highlighted that the CMAN director makes 15,000 soles *a month*, a salary that comes from the taxes of victim-survivors.[125]

They pointed out that for elderly persons, especially those who are sick, or for large families, this amount will hardly make a difference in their lives. The reparation did not contemplate the very point of reparations: to compensate what was lost. The victims lamented that the amount did not contemplate the loss of life opportunities (proyecto de vida), the loss of animals and homes, and, above all else, the loss of lives that could never be

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120. "En la toma de decisiones y definiciones de sus propios procesos de construcción y reconstrucción social, cultural, y material mediante un proceso de dialogo y consulta que presupone incorporar y desarrollar las sugerencias de la población involucrado." *Id.*

121. "Seguimos creyendo que la consulta a la población afectada por la violencia constituye, además de un imperativo de la Ley, una oportunidad para incluir en las decisiones políticas a quienes históricamente han sido excluidos. En consecuencias, deseo animarla a continuar en la búsqueda de dicho reconocimiento, camino en el cual puede contar con el apoyo de los integrantes del Consejo de Reparaciones." *Id.*

122. Decreto Supremo que establece el plazo de conclusión del Proceso de determinación e identificación de los beneficiarios del Programa de Reparaciones Económicas y la oportunidad de otorgamiento de las reparaciones económicas, Decreto Supremo No. 051-2011-PCM (June 18, 2011), *available at* http://www.scribd.com/doc/58315586/Decreto-Supremo-051-2001-PCM-sobre-Reparaciones-Economicas-a-Victimas.

123. Heeder Soto, *La degradación como reparación*, KAUS JUSTA (June 17, 2011), http://kausajusta.blogspot.com/2011/06/la-degradacion-como-reparacion.html.

124. *Id.*

125. *Id.*

returned. One queried "How much does a life cost? How much does lost property cost? How much does family happiness cost? How much does the absence of a loved one cost?"[126] He questioned why victim-survivors would receive so little compared to other groups who had received reparations (like the self-defense committees),[127] and answered his own inquiry: "Because the majority of victims are farmers who live in extreme poverty and are considered third class citizens."[128]

Above all else was the critique that the new law did not reflect international standards on the right to reparation. As one victim pointed out: "We are not asking for a handout, this is our right."[129] Victim groups also recognized that the proposal disregarded the concept of consultation and negotiation with the beneficiaries. As one victim aptly put it:

> Reparations are a means for the victims to exercise their citizen rights that were violated during the period of political violence. Thus, reparations are not satisfied merely by awarding compensation through goods and/or services. To deny victims their citizen rights is to return them to the conditions of marginalization, disrespect and discrimination. It is re-victimization.[130]

The Institute for Legal Defense, a human rights organization that has represented victims throughout the last several decades, reported that the law was far from reparatory and failed to close wounds. Instead, it "represents a mistreatment of the victims, a lack of understanding and little capacity for dialogue."[131]

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126. "¿Cuánto cuesta esta vida? ¿ Cuánto cuesta aquellos bienes, que han perdido? ¿ Cuánto cuesta la felicidad que tenían, con el familia? ¿Cuánto cuesta la ausencia del victimado, en la familia? ¿Cuánto cuesta la educación perdido de los hijos de la victimado?" *Id.*

127. *Id.*

128. ¿"Porque la mayoría de las víctimas son campesino, viven en la extrema pobreza; considerados ciudadanos de tercera categoría?" *Id.*

129. "No estamos pidiendo una dádiva este es un derecho que nos corresponde." *Víctimas y familiares de la violencia exigen la derogación del DS 051-2011 – PCM*, ASOCIACIÓN PRO DERECHOS HUMANOS, http://www.aprodeh.org.pe/index.php?option=com_content&view=article&id=96:tragedy-troubles-angels&catid=38:sports/.

130. "La reparación es una medida que busca que las victimas puedan ejercer sus derechos ciudadanos que fueron vulnerados durante el periodo de violencia política. Por esto, las reparaciones no se agotan con la dación de las compensaciones a través de bienes y/o servicios. Pretender negar los derechos que como ciudadanos tienen las víctimas, es volver a colocarlos en condiciones de marginación, desprecio y discriminación. Es la re victimización misma." *Id.*

131. "Lejos de ser reparadoras y cerrar heridas, representan un maltrato a las víctimas, una falta de entendimiento y muy poca capacidad de diálogo." *Pronunciamiento: Se debe derogar Decreto Supremo sobre las reparaciones económicas a las víctimas de*

It did not go unnoticed that the new law was announced only forty-five days from the end of the president's term and promoted as "buena acción" (good work) to perhaps favor Garcia's bid for presidency in 2016. In fact, soon after the issuance of the resolution, the press captured pictures of the government handing out giant checks in the poorest regions, targeting the poor farmers. In *Good Housekeeping* sweepstake style, the gesture confused populations who often accepted the money lacking a proper understanding of what they were receiving and why—a feat described by one commentator as "a vile deception."[132] Yet for the purposes of the general population—far removed from the world of human rights and the post truth commission process—the government may have appeared to be fulfilling its obligation to repair.

Indeed, mainstream press reports covered the ceremony and quoted Minister Rosario Fernandez as saying:

> [A]ny compensation will always be partial because the lost lives will never be returned. The economic reparation program does not try to replace these lost lives, which have no monetary price, but is rather an effort of the government to help those who suffered as a result of the *terrorist* violence.[133]

Reflected in her comment and terminology is the lack of recognition that the government also caused much of this violence through state terrorism. In so doing, the full symbolic import of the economic reparations was lost.

IV. Conclusion

Peru's recent experience with the implementation of economic reparations presents important lessons for governments attempting to repair past human rights violations. This Article has proposed two ways in which Peruvian government might have avoided the re-victimization of the intended beneficiaries of its reparation program: namely the inclusion of the participatory and symbolic quotients in the design and implementation of their reparation program. While these approaches will not prevent or resolve all political tensions, they will, I contend, help governments preserve the reparative effects of reparation programs and deepen democratic habits.

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la violencia política, Instituto De Defensa Legal (June 17, 2011), http://www.idl.org.pe/notihome/notihome01.php?noti=191.

132. Email from Peruvian leader of victim-survivor group (June 29, 2011 (7:26 p.m.)) (on file with author).

133. *Jefa del Gabinete entrega reparaciones individuales*, El Peruano (July 17, 2011).

That said, despite the ameliorative effects of the participatory and symbolic quotients, they are not sufficient for establishing clear international guidelines and criteria for defining the content of reparation policy, including fair and adequate parameters and modalities of economic reparations.[134] This important task still demands attention. Moreover, it is important to highlight that strengthening the participation of beneficiaries requires serious commitment. This is true not only with respect to creating space for their meaningful engagement in the process, but also with respect to providing needed technical support to build their individual and organizational capacity to assume more agency in the reparation process. The challenges inherent in promoting and guaranteeing processes of participation are great and need to be carefully considered in implementing a participatory-focus to reparations.[135] In the end, this commitment and investment in the capabilities of victim-survivors may be one of the most important, although often overlooked, reparative focuses of a transitional justice process.

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134. There are some efforts to offer direction in the development of such guidelines. *See, e.g.*, Cristián Correa, *Making Concrete a Message of Inclusion: Reparations for Victims of Massive Crimes, in* VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA 185 (Rianne, Monique Letschert et al. eds., 2011); Heidi Rombouts & Stef Vandeginste, *Reparation for victims in Rwanda: Caught between theory and practice, in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 309 (K. De Feyter et al. eds., 2005).

135. *See generally Mental Health Reparations, supra* note 19, at 136; Correa et al., *supra* note 41.