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SYMBOLIC REPARATIONS AND RECONCILIATION: LESSONS FROM SOUTH AFRICA

*Ereshnee Naidu**

INTRODUCTION

With the growth of the transitional justice field in the past two decades, the issue of reparations for victims of gross human rights violations has taken center stage in national and international law and politics alike. The right to a remedy for such victims is asserted in a variety of the regional and international human rights documents that have emerged from the post-World War II period.¹ The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter “Guidelines”) outline what such remedies should look like, drawing on international instruments such as the UN Charter, the Universal Declaration of Human Rights, and the international covenants on human rights.² According to the Guidelines, reparations can take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.³ Given this constitutive diversity, truth commissions the world round have recommended a variety of reparative mea-

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1. *See, e.g.*, Rome Statute of the International Criminal Court, art. 75, 78, July 17, 1998, 2187 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, Mar. 7, 1966, 660 U.N.T.S. 195; Universal Declaration of Human Rights, art 8, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

2. *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), *available at* <http://www2.ohchr.org/english/law/remedy.htm>.

3. *See id.* ¶¶ 19-23.

tures that seek to provide justice for victims and to rebuild societies emerging from conflict.

This Article considers South Africa's experience with one such reparative measure: memorialization. Under the broad banner of symbolic reparations,⁴ memorialization has gained increased credibility as one of the many forms of reparations that can assist post-conflict societies in coming to terms with the past. Various truth commissions, such as those established in Chile, South Africa, Liberia and Timor-Leste, have made recommendations for symbolic reparations initiatives within a broader reparations framework, noting its potential to contribute to processes of reconciliation, healing, victim recognition, and guarantees of non-repetition of past abuses.⁵ Whether memorialization initiatives in fact contribute to these ends nevertheless depends on multiple factors. In particular, as the South African experience suggests, such initiatives can be meaningful only if linked to other forms of reparation and part of a comprehensive package that includes compensation, rehabilitation, and increased access to health services and community reparation. Indeed, for most societies recovering from the aftermath of violence, there are a variety of competing needs—of individuals, the collective, and the state—that require constant mediation.⁶ Initiators of reparations programs seeking to achieve some of the social, psychological and political goals of reintegrating victims into society, rebuilding civic trust, and re-establishing equal conditions amongst citizens must take these competing needs into account in post-conflict reconstruction and transformation.⁷

Through the case of South Africa's Truth and Reconciliation Commission (TRC), this Article examines some of the challenges faced by post-conflict states in implementing truth commission recommendations, partic-

4. Within the Guidelines, symbolic measures such as commemorations and apology are included under the broad category of "satisfaction." *See id.* 22.

5. *See* REPUBLIC OF LIBERIA TRUTH AND RECONCILIATION COMMISSION, CONSOLIDATED FINAL REPORT, vol. 2, pt. 17.0, ¶ 2, at 276 (2009), <http://trcofliberia.org/resources/reports/final/volume-two-layout-1.pdf>; COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR-LESTE, CHEGA! FULL REPORT, pt. 11, § 12.7, ¶ 4, at 40 (2005), <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/11-Recommendations.pdf>; TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT OF THE REPARATION & REHABILITATION COMMITTEE, vol. 6, § 2, ch. 1, ¶¶ 13-15, at 95 (2003), <http://www.justice.gov.za/trc/report> [hereinafter RRC REPORT]; CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, RETTIG REPORT, pt. 4, ch. 1, § B, ¶¶ 1-3, at 1058-60 (1991), http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report_PartIV.pdf.

6. *See* Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in THE HANDBOOK OF REPARATIONS 560, 560-88 (Pablo de Greiff ed., 2006).

7. *See id.*

ularly regarding symbolic reparations such as memorialization, and how these challenges relate to broader issues of social and economic transformation. Part I provides an overview of the South African TRC, its mandate, and the recommendations it made for economic and symbolic reparations. Part II focuses on the extent to which compensation and symbolic reparations recommendations have thus far been implemented in South Africa and hence some of the TRC's "unfinished business." Through a discussion of the Freedom Park Memorial project, the Article will highlight how symbolic reparations projects can at times create contestation and divisions if they are not adequately complemented by other reparations processes and supported by broader socio-economic transformation. The Article concludes with lessons that might be drawn from the South African experience by other transitional justice initiatives in the process of implementing TRC recommendations, including those in the Republic of Korea.

I. THE SOUTH AFRICAN TRC

A. *Mandate*

Notorious for its Apartheid policies, South Africa was a pariah of the international community from the 1950's up until its first democratic election in 1994. Based on a legislated scheme of racial discrimination that systematically dispossessed and disenfranchised black South Africans, Apartheid permeated all aspects of social, cultural, political and economic life in South Africa.⁸ Following increased political pressure from the international community and internal liberation movements, coupled with the ongoing protracted violence that reached its peak in the 1980's, political negotiations were begun in the early 1990s between the National Party-led Apartheid state and liberation movements, a process that eventually led to the nation's first democratic election in 1994. It was nonetheless the establishment of the South African TRC in 1995 that became the symbolic marker of South Africa's transition from an Apartheid past to a peaceful democracy. The TRC was set up amidst high expectations of uncovering the truth about South Africa's hidden past and providing a basis for rebuilding a society devastated by racial divisions and conflict. It has since become celebrated as a successful model for coming to terms with the past, replicated in truth seeking processes in countries around the world.

Borne of a negotiated political settlement, the South African TRC was established through the Promotion of National Unity and Reconciliation Act

8. See generally NIGEL WORDEN, *THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, APARTHEID, DEMOCRACY* (2007) (providing a historiography of South Africa).

No. 34 of 1995.⁹ That Act mandated the TRC to investigate politically motivated gross human rights abuses that took place between 1960 and 1994; to construct an impartial record of the past; to grant amnesty to perpetrators of gross human rights violations in exchange for full disclosure; and to provide recommendations for a reparations policy aimed at rehabilitating and restoring the human and civil dignity of victims.¹⁰ Overall the mandate of the TRC was developed with a view to achieving the broader goals of promoting reconciliation, nation building, and the non-repetition of past abuses.¹¹ It was made up of three committees: the Human Rights Violations Committee (HRV), which investigated “gross” human rights abuses taking place between 1960 and 1990; the Reparations and Rehabilitation Committee (RRC), which was tasked with developing recommendations for reparations; and the Amnesty Committee (AC), which reviewed amnesty applications and was granted the power to provide amnesty for those perpetrators whose crimes were politically motivated and who made full disclosures of the violations they had committed.

The South African TRC was in many ways an important step forward in the evolution of transitional justice models. Based initially on the Chilean truth seeking model, it nonetheless incorporated a variety of institutional innovations. It was the first commission of its kind that had legal powers to grant amnesty to individual perpetrators and to subpoena, search, and take possession of evidence to be used in prosecutions.¹² It not only took individual testimonies, but held special and institutional hearings.¹³ It likewise created a witness protection program and was substantially more resourced than previous commissions.¹⁴ Most importantly, however, it held more public hearings than previous commissions, allowing individual victim stories to become integrated into the broader national narrative.¹⁵ In these ways and others, the TRC made significant advances with respect to truth seeking and providing a platform for victims to share their stories.

Scholars and advocates have nonetheless noted significant limitations in the TRC’s mandate and the reconciliation discourse intrinsic to it. These

9. See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf>.

10. See *id.* ch. 2, § 3.

11. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, vol. 1, ch. 4, ¶¶ 1-4, at 48-49 (1998), <http://www.justice.gov.za/trc/report> [hereinafter TRC REPORT].

12. See *id.* ¶ 26, at 54.

13. See *id.* ¶ 28, at 54.

14. See *id.* ¶ 29, at 55. For a detailed discussion of the uniqueness and successes of the South African TRC process, see *id.* ¶¶ 24-30, at 54-55.

15. See *id.* ¶ 27, at 54.

limitations have resulted in some of the challenges that South Africa today faces with regard to issues of transformation, reconciliation and the realization of an equitable democracy. First, the Act establishing the TRC limited its mandate to investigating “gross violations of human rights,” statutorily defined as “the killing, abduction, torture or severe ill-treatment of any person”¹⁶ As has been widely noted, this limited definition focused the TRC’s truth-revealing gaze narrowly on physical violations associated with direct political conflict between state agents and political activists, excluding the pervasive and negative social and economic effects Apartheid had on the majority of South Africans.¹⁷ As Madeleine Fullard and Mamphela Ramphele have argued, the failure of the TRC to grapple head-on with the structural inequalities between blacks and whites has made it difficult for the majority of South Africans to move on, as these issues continue to remain barriers to post-conflict transformation.¹⁸

The reconciliation discourse associated with the TRC and its mandate has similarly made it difficult for many South Africans to move forward.¹⁹ Various civil society observers and scholars note that while the majority of white perpetrators received amnesty for full disclosure without having to show any remorse or personal responsibility for the crimes they committed, the burden of forgiveness and moving on was ultimately placed upon the

16. *Id.* ¶ 42, at 60.

17. See Mahmood Mamdani, *The Truth According to the TRC*, in *THE POLITICS OF MEMORY: TRUTH, HEALING AND SOCIAL JUSTICE* 176, 178-81 (Ifi Amadiume & Abdullahi An-Naim eds., 2000).

18. See MAMPHELA RAMPHELE, *LAYING GHOSTS TO REST: DILEMMAS OF TRANSFORMATION IN SOUTH AFRICA* (2008); Madeleine Fullard, Centre for the Study of Violence and Reconciliation, *Dis-placing Race: The South African Truth and Reconciliation Commission (TRC) and Interpretations of Violence* (2004), <http://www.csvr.org.za/docs/racism/displacingrace.pdf>. According to Ramphele, the differences in the education systems, health services and other social services for blacks and whites under Apartheid, has resulted in an unequal human capital base where the skills gap between blacks and whites prevents South Africans from being able to engage as equals working together towards a non-racial democracy. See RAMPHELE, *supra* at 14-15. See also CLAIRE MOON, *NARRATING POLITICAL RECONCILIATION: SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION* (2009).

19. Some commentators argue that the TRC’s emphasis on racial inclusivity resulted in an over-representation of white victims at the hearings, thereby distorting the overwhelming impact of Apartheid on the majority of black communities. See *TRC Category-4 Reparations*, *TRACES OF TRUTH: DOCUMENTS RELATING TO THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION*, http://truth.wvl.wits.ac.za/cat_descr.php?cat=4 (last visited Aug. 8, 2012).

victims.²⁰ In part this was related to the reconciliation discourse perpetuated by the TRC. Based on the African concept of *ubuntu*,²¹ the discourse of reconciliation was located within an African identity that placed a moral burden on victims to forgive.²² According to government officials who work on monitoring the implementation of the TRC recommendations, some of the challenges faced in realizing reconciliation arise from the number of political concessions the TRC made and its associated reliance on the goodwill of South Africans at large to take further the reconciliation process. The result is that racial reconciliation has still not been realized since the inequalities of the past remain unaddressed and the status quo remains largely unchanged.²³

In particular, it is important to note the TRC's reluctance to address directly issues of race and racism in clarifying the truth of the past. Under an ethos of "non-racialism" and in an effort to promote racial inclusivity, the TRC's enabling legislation is in fact devoid of specific reference to either "apartheid" or "racism."²⁴ This failure of the TRC to confront the connection between human rights violations and the racialized power relations in which they took place has substantially diminished its relevance to the daily lives of ordinary black South Africans. As has been noted, the TRC's work appears in this regard "sharply detached from the concerns with race which have become the substance of national debate, media interest, court cases and disputes in the formal and informal terrain in South Africa."²⁵ It is here, "around race and the economy and the cultural legacy of racism," it has been argued, that the "more potent site of transition, the real language of change" can be located in South Africa.²⁶ And, yet, the TRC was substantially constrained from going there under the limits of its mandate.

20. Interview with NGO representatives and former TRC Commissioner in Johannesburg and Cape Town, S. Afr. (Sept 2011).

21. The concept of *ubuntu* was popularized by Archbishop Desmond Tutu during the TRC. The term refers to a mutual recognition of humanity in each other. It is in recognizing the humanity of another that one's own humanity is enriched and enhanced. See RAMPHELE, *supra* note 18, at 117-18.

22. See ANTJIE KROG, COUNTRY OF MY SKULL 109-11 (2002). Archbishop Tutu, for example appealed to the Africaness of victims to take the moral high ground and begin the process of forgiveness. He also pleaded with white South Africans to extend a hand of reconciliation which was not forthcoming from many perpetrators. *See id.* at 109-11, 158, 286.

23. Interview with officials from the South African Department of Justice: Post TRC Unit, in Pretoria, S. Afr. (Sept. 7, 2011) [hereinafter Post TRC Unit Interview].

24. *See* Fullard, *supra* note 18, at 30.

25. *Id.* at 44.

26. *Id.*

B. *Reparations*

In her examination of restorative justice processes and the role of victims and perpetrators in rebuilding relationships destroyed by gross human rights violations, Margaret Walker notes the difficult task of acknowledgment and acceptance that is required for reconciliation processes.²⁷ However, she also notes that paramount to the restorative justice model is that it places at its core the material, emotional and moral needs of victims, required to reinstall hope and trust amongst victims.²⁸ Apart from the truth seeking process itself, reparations are amongst the most important mechanisms that serve to acknowledge victims, working toward the restoration of their dignity and reintegration into society. According to Pablo de Greiff, reparations give truth seeking processes a forward looking character since they are linked to justice processes, serving to recognize the individual victim as a human being and as a citizen.²⁹ He notes that reparations can serve the purpose of creating a renewed social contract that rebuilds relationships and enables victims to re-engage as active members of the society.³⁰

In South Africa, the issue of reparations was at the forefront of the truth commission process. Reparations were perceived not only as balancing the amnesty clause inherited from the negotiated political settlement, but also as one of the most significant means of providing justice for victims and contributing to reconciliation and reintegration processes for victims.³¹ Correspondingly, very early into the TRC's work, many following it recognized that the achievements of the Reparation and Rehabilitation Committee (RRC) would be the indicator of the TRC's success as a whole.³²

While initial discussions around reparations focused only on recommendations for the government to pay monetary compensation to victims, the RRC eventually developed a comprehensive and complementary set of recommendations based on victims' expressed needs, national consultative workshops, and inspiration drawn from international law and other models of best practice. Recognizing that "without adequate reparation and rehabil-

27. See MARGARET WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* 383 (2007).

28. See *id.*

29. See Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 6, at 465.

30. See *id.* at 464-65.

31. See RRC REPORT, *supra* note 5, § 2, ch. 2 (providing justification for reparations).

32. See KROG, *supra* note 22, at 165.

itation measures, there can be no healing or reconciliation,"³³ these recommendations incorporated five distinct forms of reparation: urgent interim reparations, individual reparation grants, symbolic reparation and legal administrative measures, community rehabilitation, and institutional reforms.³⁴

Under the RRC's suggestions, urgent interim reparations were to include a once-off limited financial payment to be made to victims with urgent needs, who required access to special services or facilities.³⁵ Second, the RRC recommended that individual reparation grants not to exceed ZAR 23,023 (approximately US\$3,000) be paid annually to survivors over a period of six years. Subject to the recommended maximum, the precise amount of the grant would vary by individual according to a prescribed set of criteria.³⁶

Third, the RRC recommended that a set of symbolic and legal administrative measures be taken to facilitate communal processes of memory and to restore the dignity of victims and survivors.³⁷ Recommendations for memorialization initiatives included exhumations, reburials, and ceremonies; the placing of tombstones; the building of memorials and monuments; the renaming of streets and public facilities; and culturally appropriate ceremonies.³⁸ Legal and administrative measures were to include the issuing of death certificates for missing persons, the expunging of criminal records for politically motivated crimes, and the expediting of outstanding legal issues related to violations.³⁹

At the same time, the RRC noted that various communities experienced systematic abuse during Apartheid. Community rehabilitation programs, such as national demilitarization, resettlement of displaced persons and communities, skills training, and support for community psycho-social support initiatives, were thus recommended to promote healing, to reintegrate perpetrators into community life, and to provide broader community rehabilitation.⁴⁰ Finally, the RRC recommended legal, administrative and institutional reform in the judicial sector, security forces, correctional services, education system, and business and media sectors with a view to preventing the recurrence of human rights violations.⁴¹

33. TRC REPORT, *supra* note 11, vol. 5, ch. 5, at 174.

34. *See* RRC REPORT, *supra* note 5, § 2, at 93-96.

35. *See id.* at 94.

36. *See id.* § 2 (for more details).

37. *See id.* at 95.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

Significantly, while the RRC noted that government had the moral and legal obligation to pay reparations to victims—and suggested a concrete implementation structure for the government to put in place—it recognized that other sectors of society were also responsible for the implementation of its reparations recommendations.⁴² In particular, the RRC concluded that businesses had benefitted materially and financially from Apartheid policies and as such the business and corporate sector bore responsibility for reparations.⁴³ In recognizing that “‘the huge and widening gap between the rich and poor is a disturbing legacy of the past’ and given the historic benefit enjoyed by business,”⁴⁴ the RRC made specific recommendations for businesses and large corporations to contribute to restitution programs for those affected by Apartheid.⁴⁵ At the same time, in acknowledging the need for all South Africans to contribute to healing and reconciliation processes as well as the successful civil society initiatives that were already underway, the RRC recognized the role of civil society to make positive contributions toward reparations initiatives.⁴⁶ The report notes creative arts projects and symbolic memory initiatives as key areas for civil society’s contribution.⁴⁷

The RRC report concludes by noting that acknowledgement and the recognition of victims and survivors is one of the most important factors required for the country to move forward.⁴⁸ Significantly, it underscored that one of the major challenges it faced in advancing the rehabilitation and reparation process was the difficulty in distinguishing victims from non-victims and making the distinction between politically-motivated crimes of gross human rights violations from broader oppression that permeated everyday life in South Africa.⁴⁹ It likewise noted that many of its recommendations were essentially symbolic acts since they could never meet the standard of proportionality or make up for the experiences and loss that victims have undergone. The South African government’s implementation of the recommendations was nonetheless necessary to “signal a commitment to establishing a just and humane society in which human rights are respected.”⁵⁰

42. See *id.* chs. 5-6 (highlighting respective roles of business sector and other institutions of civil society).

43. For more details see *id.* ch. 5.

44. *Id.* at 141.

45. See *id.* at 143.

46. See *id.* at 156-59.

47. For more details see *id.* ch. 6.

48. See *id.* ch. 7, at 160.

49. See *id.* at 161.

50. *Id.* at 162.

II. THE IMPLEMENTATION OF REPARATIONS RECOMMENDATIONS

Agreeing with the TRC, various scholars argue that the actual granting of reparations to victims and the processes around which the various forms of reparations are made exemplifies the state's will to re-establish equality, trust and respect amongst all citizens.⁵¹ By contrast, the failure to provide reparations signals to victims that democracy and peace are being built on their suffering and fails to recognize their broad contribution to the process of truth seeking and broader reconciliation and democracy-building processes.⁵² Despite a roadmap from the TRC providing guidelines for a holistic reparations strategy aimed at addressing the needs of individual victims as well as the broader society, the government has demonstrated a remarkable lack of will in implementing a comprehensive reparations program. Following the recommendation of the TRC, in 2005 the government established a Post-TRC Unit within the Department of Justice. The unit was established with a mandate to monitor and audit the implementation of the TRC recommendations, reporting regularly to parliament the progress made by various government departments in implementing the TRC recommendations. While officials within the department claim that substantial progress has been made in terms of implementing individual reparations, symbolic reparations, and the provision of medical and education services for survivors and families of victims,⁵³ implementation is still languishing as of 2012. As Wendy Orr, one of the RRC Commissioners, has argued, the delays experienced in the final reparations program have been the most damaging aspects of the Truth Commission's work and threaten to undermine the nascent healing process the TRC may have facilitated in some of the victims.⁵⁴

A. *Economic Reparations and Urgent Interim Reparations*

As noted above, the TRC recommended that Urgent Interim Reparations (UIR) be granted to survivors and families of victims who urgently required access to certain services or facilities. Such urgent reparations should have been disbursed in 1998, with the release of the TRC's interim

51. See de Greiff, *supra* note 29, at 460-66; Hamber, *supra* note 6, at 576; RAMPHELE, *supra* note 18, at 64-69.

52. See de Greiff, *supra* note 29, at 460-66; Hamber, *supra* note 6, at 576-80.

53. Post TRC Unit Interview, *supra* note 23.

54. See Wendy Orr, *Reparation Delayed is Healing Retarded*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 239, 242-43 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) [hereinafter LOOKING BACK].

report. The government nonetheless delayed a full five years, under the claim that reparations could not be disbursed until the TRC's final report was issued.⁵⁵ It was thus not until the end of 2003 that the government made UIR available to individuals who proved an urgent medical, financial, educational, symbolic or emotional need. At this time, ZAR 50 million was distributed to 16,500 of the 18,800 total victims identified as requiring it.⁵⁶ Yet, as Yazir Henry has noted, the delays experienced in URI payments served to disconnect the testimonial experience of the TRC from the reparations measures, reducing "the symbolic sense of the reparation," and in the process often doing more harm than good."⁵⁷

In 2003, following extensive lobbying and advocacy from various civil society organizations regarding individual economic reparations, then President Thabo Mbeki similarly announced a once off payment of ZAR 30,000 (approximately US\$4,000) to be paid to the 18,000 victims that had testified before the TRC.⁵⁸ This amount was nonetheless significantly below the sum recommended by the RRC, which had indicated that grants should be paid in semi-annual installments over six years based on the median annual household income in 1997 for a family of five.⁵⁹ Under this recommendation the average grant would have amounted to approximately US\$15,000, or roughly four times the actual quantum granted. As of September 2011, in line with the regulatory schedule set out by the President for the issuance of victim reparations, the government had completed payments to 15,000 of the 16,000 survivors deemed eligible for compensation.⁶⁰

President Mbeki also announced his support for "community reparations," but insisted that they would be implemented as a part of a broader reparations strategy that would benefit all South Africans rather than individual victims. Victims groups have nonetheless contested this approach. According to Brandon Hamber, no reparations program has been granted as a part of a broader development program.⁶¹ He argues that access to im-

55. See Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in THE HANDBOOK OF REPARATIONS, *supra* note 6, at 176, 187-89, 201.

56. See *id.*; see also Matome Sebelebele, *Grants for Apartheid Victims*, SOUTHAFRICA.INFO (Apr. 16, 2003), <http://www.southafrica.info/services/rights/trc-reparations.htm>.

57. Yazir Henry, *Where Healing Begins*, in LOOKING BACK, *supra* note 54, at 166, 172.

58. See Promotion of National Unity and Reconciliation Act, GN R1660 of 12 Nov. 2003 (S. Afr.), http://www.justice.gov.za/legislation/regulations/r2003/2003_r1660_gg25695-nat-unity.pdf

59. See Colvin, *supra* note 55, at 194.

60. Post TRC Unit Interview, *supra* note 23.

61. See Hamber, *supra* note 6, at 573.

proved social services was a campaign pledge by the ANC government and as such more a right than a form of reparations that recognizes individual harm and loss.⁶² In focus groups conducted with victims in September 2011, many victims also noted that it was government's duty to provide services to all South African citizens and since services were not aimed at victims alone, community reparations framed as service delivery could not be classified as reparations.⁶³

Apart from victims' disappointment by the sum of the compensation, the Mbeki-led government demonstrated a remarkable unwillingness to address or support victims' needs or to consult with them about the implementation process. As has been noted, the government has failed to engage victims, NGOs and other groups in ongoing dialogue about reparations, with justice ministers and other officials emphasizing that they are under no obligation to consult with victims at any point in the process.⁶⁴ Feeling abandoned and revictimized, victim support groups have in fact been forced to file Access to Information Act requests to access the government's draft policy on reparations.⁶⁵

The government's lack of will with respect to reparations has likewise been evident in its refusal to move forward on the TRC recommendation of a wealth tax for corporations and big businesses – a tax which was recommended to supplement the reparations fund.⁶⁶ Following the government's unwillingness to address the role of the corporate sector as a beneficiary of Apartheid, in 2002 a group of South Africans represented by the Khulumani Support Group⁶⁷ sued twenty international banks and corporations in U.S.

62. *See id.* at 575.

63. Interview with survivors from Khulumani Support Group, in Johannesburg and Cape Town, S. Afr. (Sept. 6, 2011, Sept. 9, 2011, Sept. 12, 2011) [hereinafter Khulumani Interview].

64. *See* Colvin, *supra* note 55, at 201.

65. *See id.* at 202-03.

66. In August 2011, former TRC Chairperson, Archbishop Desmond Tutu made a public call for a wealth tax to be imposed on white South Africans. He noted that while all white South Africans did not support Apartheid, the majority benefitted from the system. Most important to note is that Archbishop Tutu's statement received a diverse range of public reactions, many of the discourses reflecting some of the underlying, unresolved racial tensions that are still prevalent in South Africa today. *See* Murray Williams, *Tutu Calls for Wealth Tax on Whites*, IOL NEWS (Aug. 12, 2011), <http://www.iol.co.za/news/politics/tutu-calls-for-wealth-tax-on-whites-1.1116744>.

67. The Khulumani Support Group is one the largest survivor support groups in South Africa. It was formed in 1995 by survivors and families of victims of human rights violations and was set up in response to the pending TRC. *See About Us*, KHULUMANI SUPPORT GROUP, <http://www.khulumani.net/khulumani/about-us.html> (last visited Aug. 21, 2012).

federal court under the Alien Tort Claims Act for undertaking business in South Africa during Apartheid.⁶⁸ While the case is still in process, it is noteworthy that the Mbeki government filed documentation with the district court and appeals court outlining its opposition to the case on the grounds that it would discourage foreign investment in the country. In September 2009, the newly elected South African President, Jacob Zuma, announced his support for the Khulumani Support Group lawsuit by rescinding the government's previous opposition to the case. In February 2012, as a "show of good faith," U.S. General Motors agreed to a settlement of US\$ 1.5 million to be split between the Khulumani Support Group and twenty-five South African claimants who were victims of Apartheid.⁶⁹

Despite a seemingly more sympathetic view toward survivors' needs from the Jacob Zuma government, survivors are still faced with significant official resistance in their struggle for reparations and justice. Since 2010 the government has been drafting guidelines for the utilization of funds available in the South African President's Fund for the Implementation of Reparations.⁷⁰ It has nonetheless been unreceptive to the lobbying efforts of the recently formed South African Coalition for Transitional Justice, which is seeking to revise the government's proposed reparations regulations such that they are inclusive of all victims who suffered human rights violations under Apartheid, not only the minority who testified before the TRC.⁷¹ They thereby seek to replicate international best practices undertaken in Argentina, Chile and Guatemala, where closed lists of victims were re-opened or ongoing victim registration continued beyond the immediate life of truth commission processes.⁷²

68. See Colvin, *supra* note 55, at 208-09. For a detailed description of the ensuing lawsuit, see *Case Profile: Apartheid Reparations Lawsuits (re: So. Africa)*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica> (last visited Aug. 21, 2012).

69. See David Smith, *General Motors Settles with Victims of Apartheid Regime*, THE GUARDIAN (Mar. 2, 2012), <http://www.guardian.co.uk/world/2012/mar/02/general-motors-settles-apartheid-victims>.

70. Post TRC Unit Interview, *supra* note 23.

71. The South African Coalition for Transitional Justice was formed in 2010 and is made up of civil society organizations working on questions of transitional justice, lobbying for the completion of some of the 'unfinished business' of the TRC.

72. See Khulumani Support Group, *No Cohesion without Reparations! – The Struggle for Inclusive and Comprehensive Reparations: A View from the South African Coalition for Transitional Justice* (July 22, 2011), <http://www.khulumani.net/reparations/government/item/499-no-cohesion-without-reparations—the-struggle-for-inclusive-and-comprehensive-reparations-a-view-from-the-south-african-coalition-for-transitional-justice.html>.

Given the ongoing challenges that survivors have faced with regard to their right to reparation, survivors have become increasingly disillusioned with the TRC process, arguing that the TRC was a political project, implemented to appease the international political community.⁷³ Such survivors argue that justice has still not been attained, and that the government's negative attitude towards survivors not only contributes to their existing trauma, but also possibly "pass[es] the pain from one generation to another."⁷⁴ In the ongoing struggle for monetary reparations, can other forms of reparations such as symbolic reparations contribute toward recognizing victims and reconciling the broader South Africa society?

B. *Symbolic Reparations*

In 2003, President Mbeki agreed to the implementation of various symbolic reparations activities, such as the building of memorials and the renaming of public facilities.⁷⁵ In recommending symbolic reparations, the RRC underscored their role in restoring the dignity of victims and "facilitat[ing] the communal processes of commemorating the pain and celebrating the victories of the past."⁷⁶ While central to recognizing survivors and victims, the RRC noted, such reparations nevertheless should be "linked with endeavours that improve the everyday lives of victims and their communities."⁷⁷ To ensure this end, the RRC recommended that survivors play a central role in all aspects of symbolic reparations projects, including their design, building and administration.⁷⁸

Memorialization initiatives were of course already underway in post-Apartheid South Africa before the TRC adopted the language of symbolic reparations. Several memorialization initiatives such as the internationally acclaimed Robben Island Museum in Western Cape were created before the publication of the final TRC report. In her study of the role of memory in the daily lives of South Africans, Heidi Grunebaum argues that memorial sites such as the Robben Island Museum are political projects that serve to resonate with the ideological framework of the TRC, promoting and concretizing the narrative of the rebirth of a new, reconciled nation.⁷⁹ Such memorialization initiatives were in many ways necessary in the post Apartheid

73. Khulumani Interview, *supra* note 63.

74. *Id.*

75. *See* Colvin, *supra* note 55, at 209.

76. TRC REPORT, *supra* note 11, vol. 5, ch. 5, at 188.

77. RRC REPORT, *supra* note 5, ch. 7, ¶ 14, at 163.

78. *See id.*

79. *See* HEIDI GRUNEBAUM, MEMORIALIZING THE PAST: EVERYDAY LIFE IN SOUTH AFRICA AFTER THE TRUTH AND RECONCILIATION COMMISSION 11, 94-98 (2011).

context, she argues, as a political tool to rewrite new narratives of citizenship and unity into the national landscape as well as to mark the new era of democracy.⁸⁰ More recent memorialization projects are nevertheless increasingly being critiqued as divisive and elitist. In particular, recent memorialization initiatives framed as symbolic reparations projects have begun to highlight some of the moral questions around race and racism that the TRC left unaddressed.⁸¹ Questions of how the past should be remembered, who should be remembered and what to do with memorials that may not necessarily reflect the values of the new democracy or broader citizenship are key issues that may determine the success or failure of post-conflict memorialization and symbolic reparations processes.

A site that has been an ongoing source of contestation and controversy since its inception is Freedom Park.⁸² A national heritage site located in Salvokop Tshwane, Freedom Park aims to celebrate all those South Africans that struggled for freedom and humanity. It is also the first major memorialization project that has utilized the language of symbolic reparations in its mission.⁸³ Plans for the site include a memorial, an interactive museum and a garden of remembrance, all of which aim to provide new perspectives on South Africa's heritage. They also seek to challenge traditional narratives by re-interpreting some of the existing heritage sites, such as those celebrating Afrikaner nationalism. Important to note in this regard is that the new democratic government did not destroy any of the existing heritage sites. Thus, Freedom Park is built on a hill directly opposite the Voortrekker Monument, an icon of Afrikaner nationalism. The juxtaposition of the Voortrekker Monument and Freedom Park clearly brings to the

80. *See id.*

81. In November 2011, for example, while the author was traveling in South Africa, a white South African man was charged with attempting to steal and desecrate a statue of ANC struggle icon Nokuthula Simelane's who disappeared during Apartheid. While the theft and vandalism may be considered a random act, the act itself highlights the lack of understanding or respect towards victims and heroes of the struggle. Additionally, the public discourse around the theft and the consequent court proceedings, again point to racial divisions and the overall lack of ownership of the new narratives of post Apartheid South Africa.

82. Numerous government and civil society-led memorialization initiatives have been undertaken in South Africa, especially at the local level. Freedom Park is exceptional, and hence the focus here, in that it is a national-level memorial project that highlights reconciliation and national unity as central to its core function.

83. *See The Company*, FREEDOM PARK, http://www.freedompark.co.za/cms/index.php?option=com_content&view=article&id=1&Itemid=2 (last visited Aug. 12, 2012).

fore a dialogue about the past and the present, but also works towards mediating the Apartheid iconography of the past.⁸⁴

The Garden of Remembrance, a landscaped garden that includes statues and sculptures, commemorates and celebrates all those who contributed to South Africa's struggle for freedom. It includes a wall of names of all liberation-aligned soldiers that died during the struggle for freedom from Apartheid. As a product of collective memory and a form of symbolic reparation, it is in this way like other memorials, essentially a political project invested with ideology and meaning; it defines the boundaries between insiders and outsiders.⁸⁵

Correspondingly, in 2007, Afriforum, a local nonprofit Africans-led organization, protested the exclusion of names of former Apartheid South African Defense Force (SADF) soldiers from the wall of names in the Garden of Remembrance.⁸⁶ The group argued that the roles and contributions of SADF soldiers to South Africa needed to be re-evaluated. There were divergent arguments for the reintroduction of SADF soldiers into South Africa's new collective memory. Some argued that they wished to "shrug off the shame of being regarded as vanquished soldiers who lost the war and so ended on the wrong side of history."⁸⁷ Others took the position that SADF soldiers were victims themselves, claiming that such soldiers should not be blamed for the system of Apartheid.⁸⁸ Others argued they were protecting white South Africans against a communist insurgency and as such should be celebrated.⁸⁹

Despite the contestation, Freedom Park management has argued that Apartheid was a crime against humanity, declared such by the United Na-

84. See SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 9-11 (1998). According to Levinson, the removal of monuments that no longer reflect the values of the state risk evoking negative feelings amongst citizens that may have a stake in a specific monument. See *id.* at 9. He argues that the state needs to play a role in forming a coherent narrative that represents all citizens within a transition. See *id.* at 10-11. It can therefore be argued that the choice of space for the establishment of Freedom Park is reflective of the government's will to promote unity and inclusion.

85. See JEFFREY BLUSTEIN, *THE MORAL DEMANDS OF MEMORY* (2008); WILLIAM JAMES BOOTH, *COMMUNITIES OF MEMORY: ON WITNESS, IDENTITY AND JUSTICE* (2006).

86. See Gary Baines, *Blame, Shame or Reaffirmation? White Conscripts Reassess the Meaning of the "Border War" in Post-Apartheid South Africa*, 5 *INTERCULTURE* 224-25 (2008). The aim of Afriforum is to motivate minorities to engage in public dialogue and action "to ensure a future for us [the white minority] in Africa." *About Afriforum*, AFRIFORUM, <http://www.afriforum.co.za/english/about> (last visited Aug. 12, 2012).

87. Baines, *supra* note 86, at 226.

88. See *id.*

89. See *id.*

tions.⁹⁰ It has therefore stood by its position to exclude the names of SADF soldiers but has agreed to include the names of SADF into its database and archives.⁹¹ The Voortrekker Monument has since provided a space for a monument of names of all SADF soldiers.⁹² Further, management at the site has distinguished between reconciliation and recognition, noting that the wall of names is a symbolic reparations project which is about recognition and honoring, and *not* necessarily about reconciliation.⁹³ On December 16, 2011, at the annual Reconciliation Day commemoration ceremony, President Jacob Zuma announced the official opening of an access road between Freedom Park and the Voortrekker Monument as well as a signed Memorandum of Understanding as a symbol of goodwill between the two institutions.⁹⁴

The call for the inclusion of the names of SADF soldiers can be read as representing the perception that Apartheid era soldiers have been marginalized and need to be recognized as part of an inclusive society. Yasmin Sooka, a former South African truth commissioner has nonetheless noted that South Africans should be warned against viewing questions of human rights and rights of inclusion as value neutral.⁹⁵ The inclusion and exclusion of names in this regard is by and large a moral question that rests on the premise of those ideologies that supported the cause of freedom and those that did not. Yet, the TRC sought to avoid these moral questions. As the referential framework for the narratives of post Apartheid South Africa, the TRC failed to identify a victor or the vanquished, drawing instead on international legal standards related to just war principles.⁹⁶ Despite contestation that has played out in racial divisions, it is significant to note that South Africa's history as a whole is a contested history that has been modeled by the political elite, celebrating great heroes at the risk of downplaying the contributions of ordinary South Africans in the struggle for freedom.⁹⁷ Survivors argue that the current processes around national symbolic

90. Interview with Freedom Park staff member, in Pretoria, S. Afr. (Sept. 9, 2011).

91. *Id.*

92. *Id.*

93. *Id.*

94. See His Excellency President Jacob Zuma, President of S. Afr., Address on the occasion of the Marking of the National Day of Reconciliation, in Freedom Park, Pretoria, South Africa (Dec. 16, 2011), <http://www.thepresidency.gov.za/pebble.asp?relid=5502> [hereinafter Address by President Zuma].

95. Interview with Ms. Yasmin Sooka, in Johannesburg, S. Afr. (Sept. 23, 2011).

96. See KROG, *supra* note 22, at 127, 283-84; RAMPHELE, *supra* note 18, at 52.

97. See Ereshnee Naidu, Centre for the Study of Violence and Reconciliation, *Symbolic Reparations: A Fractured Opportunity* (2004), <http://www.csvr.org.za/docs/>

reparations projects fail to adequately recognize their role in the struggle for freedom. Not only do sites such as Freedom Park remain largely inaccessible to the public,⁹⁸ but the processes under which such sites have been developed have failed adequately to include survivors in all stages of planning and implementation.⁹⁹

Apart from contested questions around inclusion and exclusion, a major challenge with current symbolic reparations processes is that they are not necessarily linked to other forms of reparations such as compensation or community reparation.¹⁰⁰ As noted above, given some of the challenges that survivors have thus far experienced with regard to reparations and justice, many argue that symbolic reparations are only meaningful if they are part of a comprehensive package that would include compensation for all survivors, rehabilitation and increased access to health services, and community reparations.¹⁰¹

Indeed, where basic socio-economic needs are not fulfilled, memorialization may not only lose its potential as a mechanism for recognition and healing, but may also become a faultline for violence. An example is the Kliptown Memorial and Walter Sisulu Freedom Square in Kliptown, a memorialization project designed to commemorate the historic drafting of the Freedom Charter by the Congress of the People in 1955 and the early struggle against Apartheid.¹⁰² In a 2004 needs assessment study, it was found that given the town's extreme poverty and lack of basic services, the pro-

livingmemory/symbolicreparations.pdf; Ereshnee Naidu, Center for the Study of Violence and Reconciliation, *Empowerment through Living Memory: A Community-centered Model for Memorialization* (2004), <http://www.csvr.org.za/docs/livingmemory/empowerment.pdf>. See also RAMPHELE, *supra* note 18, at 52-54.

98. In focus groups with survivors, many noted that Freedom Park was inaccessible both in terms of its location and entrance fees. Some also noted that while the Khulumani Support Group was requested to submit names for inclusion on the Wall, they were not consulted further during the process, nor were they invited to participate in the opening ceremony. Khulumani Interview, *supra* note 63.

99. *Id.*

100. Pablo de Greiff notes that for any reparations program to satisfy the needs of survivors, the program must not only be *internally* coherent in that it offers a range of benefits, but also *externally* coherent in that it complements other transitional justice mechanisms. See de Greiff, *supra* note 29, at 467.

101. Khulumani Interview, *supra* note 63.

102. Kliptown, a town in the province of Gauteng in South Africa was the first town of the broader Soweto township area and has historically been a place that housed diverse groups. It was one of the first places where residents defied the various segregation policies imposed by the Apartheid state. Additionally, Kliptown was the site of the historic Congress of the People that took place on June 26, 1955, bringing together over 3000 people from diverse racial backgrounds to protest Apartheid policies of segrega-

posed new development became a source of tension, exacerbating existing divisions within the community.¹⁰³ In 2007, the Walter Sisulu Freedom Square, itself established as a part of a government sponsored income generation project, became a space for violent riots, with residents protesting the lack of basic service delivery. The irony of the protest and the space within which it occurred is that the Freedom Charter, for which the site is commemorated, emphasized the need for social justice, which is by and large absent in the Kliptown community. Furthermore, the site as a space of protest highlights the ongoing marginalization that the majority of black South Africans experience, despite the fall of Apartheid.

The government recognizes in this regard that the major challenge it faces with regard to the full realization of reconciliation is the need to improve the provision of basic services and the quality of life of the majority of black South Africans who continue to struggle with the inequalities of life inherited from the Apartheid past.¹⁰⁴ Nevertheless, socio-economic and structural change is slow to come. Survivors' frustration with their ongoing marginalization and the lack of change in their quality of life, despite high expectations following the advent of the new democracy, reflects more broadly the frustration of the majority of black South Africans. Apart from ongoing public protests related to the lack of service delivery and unemployment, the majority of South Africans have little faith in policies such as affirmative action that were aimed to redress the inequalities of the past.¹⁰⁵

III. CONCLUSIONS

Symbolic reparations may contribute to post-conflict transformation and reconciliation. Yet, they may also create divisions and fuel ongoing feelings of victimization. In South Africa, the mediated political settlement and the consequent choices made by the TRC in framing questions of justice, forgiveness, and reconciliation have impacted the way symbolic reparations have been interpreted and understood. Reconciliation and recognition as they relate to symbolic reparations projects remain fraught,

tion and oppression. The Congress of the People met to draw up the Freedom Charter which mapped an alternate vision to the repressive Apartheid policies.

103. Personal research conducted for the Centre for the Study of Violence and Reconciliation, 2003.

104. See Address by President Zuma, *supra* note 94.

105. See generally Institute for Justice and Reconciliation, *SA Reconciliation Barometer Survey: 2011 Report*, SA RECONCILIATION BAROMETER BLOG (2011), <http://reconciliationbarometer.org/wp-content/uploads/2011/12/2011-SA-Reconciliation-Barometer.pdf> (for detailed survey results of questions related to race, reconciliation, and transformation).

bringing to the surface some of the underlying tensions that were inadequately addressed by the TRC. Furthermore, the contestation around symbolic reparations highlights that not all South Africans have bought into the TRC's reconciliation narrative. Questions of historic racial privilege and bystander responsibility remain unaddressed. While symbolic reparations initiatives may have the potential to enable the country to begin a dialogue about some of these questions, the racially divisive discourse around memorialization initiatives thus far highlights that South Africa's democracy is still fragile and that South Africans are still struggling to come to terms with the past.

The TRC was successful in so far as it was able to uncover some of the silences and distortions about the past. However, for countries such as South Korea, coming out of their own truth commission processes, the success of the truth-seeking endeavor is by and large dependent on the follow-up process and implementation of truth commission recommendations. It is a challenge for any reparations program to meet all of the needs of all survivors and, again, the standard of proportionality can never accommodate the diverse kinds of loss experienced by survivors. Nonetheless, the effective implementation of a comprehensive set of complementary reparations programs, guided by a policy that is informed by survivors themselves, could further the healing process of survivors and aid their reintegration into society.

Most survivors, as in the case of South Africa, welcome symbolic measures. However, much of the success of these initiatives in fulfilling the goals of recognition, healing, and reintegration is dependent on the *processes* through which the memorial comes into being and how it relates to other reparations processes. Part of the process of recognition is ensuring that survivors feel adequately acknowledged and consulted during all phases of a symbolic reparations project. In designing a process that is consultative, and placing survivors at the center of that process, memorialization initiatives can assist in rebuilding the social capital of survivors. However, even these measures may remain meaningless if the socio-economic and development needs of survivors and the broader society have not sufficiently been addressed. For many survivors, their survivor status is linked to social and economic marginalization. For survivors, therefore, coming to terms with the past is as much about social reintegration as it is about social justice and poverty alleviation. Access to basic services such as health care, education and overall economic wellbeing, enable victims to reintegrate into society and enjoy the benefits and freedoms of living in a democratic society. As Amartya Sen notes, freedom extends beyond the

realm of civil and political rights to social and economic benefits.¹⁰⁶ Restoration of survivor's dignity, recognition of their suffering, and reintegration into society is dependent therefore on the re-building of all aspects of life: economic, social and political. While symbolic reparations may fulfill some of these goals when properly implemented, inscriptions on stone alone cannot translate into a sense of justice or an improved quality of life, both of which are essential for reconciliation.

106. AMARTYA SEN, DEVELOPMENT AS FREEDOM 1, 3 (1999).