

REPAIRING THE PAST?

SERIES ON TRANSITIONAL JUSTICE

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Countries emerging from long periods of authoritarian rule must often confront a legacy of gross human rights abuses perpetrated over many years. During the past two decades, these age-old issues have been termed “problems of transitional justice”, both by academics and policy makers around the world. Given the many experiences and the many issues involved in periods of political transitions and after violent conflicts, it is striking that no book series has taken these issues as their focal point. The new Series on Transitional Justice, published by Intersentia Publishers in Antwerp, Belgium, aims to fill this gap in international research and practice.

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REPAIRING THE PAST?

International Perspectives
on Reparations for Gross
Human Rights Abuses

Edited by
MAX DU PLESSIS and
STEPHEN PETÉ



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Edited by Max du Plessis and Stephen Peté

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PREFACE

In our introductory chapter to this work we state that, if this book has a heart, it lies in the recognition of the fact that both ancient and recent human history is littered with examples of widespread and gross violations of human rights. Appalling violations of fundamental human rights continue to be perpetrated in the present day. Despite the enduring and widespread nature of gross human rights violations, however, it is an unfortunate fact that, of the millions of people whose lives have been shattered by torture, rape, the murder of loved ones, or other gross violations of their human rights, only a tiny fraction have any hope of receiving any meaningful form of reparation.

This book may be regarded as a single modest attempt to address the problem outlined above. It is our hope that the individual chapters contained in this book will stimulate debate on the issue of reparations, and that this debate will lead to increased visibility for the many deserving groups striving for some form of meaningful recognition or recompense for past injustices visited upon them.

We do not claim that this book covers the field of reparations in a comprehensive or systematic way. Rather, it is eclectic in nature, due to the diverse areas of interest and expertise of the various contributing authors. Therefore, it should be regarded as a work designed to stimulate debate on a number of themes pertinent to the important topic of reparations, rather than as a text book which sets out to describe an entire field of study. The book is intended for practitioners and other human rights experts who are engaged in the struggle for reparations for gross human rights abuses.

This is a truly international work. As editors we are grateful to have collaborated with a range of outstanding academics and practitioners from around the world, whose individual chapters form the fabric of the book. We have not sought to censor the, at times robust, political and legal opinions of the various authors, but point out that the views and opinions expressed by the authors are not necessarily those of the editors of this book. Our heartfelt thanks are due to each of the authors. Their hard work and dedication enabled us to meet most of our publication deadlines, producing a book which we hope will contribute to a growing understanding internationally of the importance of reparations for gross human rights abuses.

The management and staff at Intersentia Press have shown unstinting support for this project throughout its long gestation and deserve our sincere thanks. In particular, we wish to thank our managing editor, Kris Moeremans, who steered the project from its inception to final completion, as well as Isabelle Van Dongen, who diligently prepared the final proofs for publication. We also wish to thank Mr Jolyon Ford, of

the Human Rights Unit, Commonwealth Secretariat, and Ms Yasmin Sooka, of the Foundation for Human Rights, for peer reviewing the book prior to its publication.

MAX DU PLESSIS

STEPHEN PETÉ

Durban

December 2006

FOREWORD

YASMIN SOOKA – FORMER COMMISSIONER OF THE SOUTH AFRICAN
TRUTH AND RECONCILIATION COMMISSION

‘Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses’, is a timely work which provides a comprehensive overview of the development of reparations, documenting the experiences of victim/ survivor groups in their attempts to secure justice for gross violations of human rights.

In their introductory chapter, entitled ‘Reparations for Gross Violations of Human Rights in Context’, Max du Plessis and Stephen Peté set out the history of mass killings of civilians and genocide that have taken place in the last century, beginning with the genocide of the Herero people in Namibia by the German Colonial forces and ending with the current genocide that is taking place in Darfur in Sudan. While international law has developed, leading to the recent establishment of the International Criminal Court, which was designed to hold those responsible for gross violations accountable, the international community has been unable to stop the ongoing violence and killing of civilians in Darfur, making a mockery of the notion that ‘it should never happen again’.

I believe that the most important components of transitional justice must be the rights of victims, which include the right to the truth, the right to acknowledgement, the right to reparations and the obligation to take steps to ensure that the violations will not occur again. In this way impunity will be addressed, provided that the structural causes of the conflict are comprehensively dealt with. Let us never forget that impunity gives rise to gross violations of human rights.

In theory, the right to reparation is an established right under international law with the earliest examples of reparation arising in the context of wrongs committed by states against states. However, the notion that individuals should be entitled to hold their own governments, corporations or other citizens accountable did not occur to those in power until after the end of the Second World War. The chapter on the history of the holocaust reparations written by Regula Ludi outlines the historical origins of individual reparation mechanisms. Ludi points out that the rights of individuals to redress for state crimes was first recognised in a legal document drafted at the Paris Reparation Conference of 1945. For victims and human rights advocates who had lobbied around this issue, this marked a turning point.

The development of reparation principles and the attempt to establish reparations as a right under international law really came into its own through the appointment by the United Nations of the Special Rapporteurs, Mr Theo van Boven and Mr M. Cherif Bassiouni to work on reparations.

Sadly, the 'Basic Principles' developed by Van Boven and Bassiouni, including the right to reparations, are still an arena of struggle for victims of violations in many countries emerging from conflict, particularly in the last decade.

Often, the development and reconstruction needs of an entire society compete with the rights of victims of gross violations to reparation. In these instances, governments have always found it easy to argue that the needs of the entire society take precedence over a group of victims. A further challenge has been that often successor governments resent the fact that they have to bear the financial burden of dealing with reparations, particularly when the violations were committed by previous rogue regimes.

Ideally, everybody whose rights have been violated should be entitled to reparations. In the opening chapter Max du Plessis and Stephen Peté argue that even if one were to take the word 'reparation' and restrict it to the definition that is widely accepted in international law, it includes diverse measures. They raise the fact that given the broad socio-political context to reparation, debate has raged over whether reparation includes measures such as affirmative action, relief aid provided by developed nations to former colonies, the establishment of truth and reconciliation commissions, as well as whether hearing the 'truth' is sufficient to constitute reparation in itself. Having had first hand experience of working with many diverse victim communities around the world, I am able to attest to the fact that reparations remains a complex issue.

Du Plessis and Peté point out that an even more difficult question to answer is whether or not a particular series of events should qualify as a 'gross abuse of human rights'. They point out that two broad sub-issues present themselves: 'when is 'gross' gross enough' and 'when is 'the past' too long ago'. The first question is difficult to answer and all countries emerging from conflict have had to grapple with it. In South Africa, the mandate of the Truth Commission was limited. The term 'gross violations of human rights' was expressly and narrowly confined to 'killings, abductions, torture and severe ill treatment'. There is no doubt that the Commission interpreted its mandate narrowly giving rise to criticism of its approach by many commentators. Mahmood Mamdani argues that this narrow interpretation of gross violations of human rights led ultimately to a 'diminished truth' which let the beneficiaries of apartheid off the hook. In my work in many countries, I have certainly found Van Boven's proposals on the categories of crimes to which attention should be paid, to be very helpful. His categories include 'genocide, slavery and slavery like practices, summary or arbitrary executions, torture and cruel, inhuman or degrading treatment or punishment, enforced disappearances, arbitrary and prolonged detention, deportation or forcible transfer of population and systematic discrimination,

particularly based on race or gender.’ One has to adopt a pragmatic view of what is possible in order to avoid raising expectations or making false promises which are often not capable of being fulfilled. Du Plessis and Peté point out that another useful reference-point is the International Criminal Court’s codification of what constitutes ‘crimes against humanity’. An important point they make is that there is a need to be vigilant about downplaying or diminishing human rights violations; as they assert the right of every victim of an egregious human rights abuse as being worthy of reparation.

Bo Jung Kwon brings a gendered dimension to this debate. She highlights the struggle for justice and redress that has been waged by the ‘comfort women’ taken by Japanese troops from occupied territories. The situation of the ‘comfort women’ reveals the complexity of issues concerned with reparations and illustrates the fact that compensation without an official acknowledgement of wrongdoing is inadequate. In her fascinating chapter, Kwon details how the Japanese government’s establishment of the ‘Asian Women’s Fund’ in 1995 was harshly critiqued by the women and their governments and was seen as an attempt to evade responsibility for the violations that had been committed against the women. While various ad hoc tribunals and Truth Commissions around the world have advanced the rights of women to deal with crimes such as these, it has not been an easy road to travel to achieve justice. Judge Hideaki’s finding in the face of hostile opinion in Japan that the Japanese Diet should have initiated legislation to address the women’s suffering, after it admitted in 1993 that it had been involved in the ‘comfort women’ system, was the first official finding on this issue from any official body in Japan. His finding that an apology by the Japanese government was not necessary as the Constitution did not provide for it was, however, disappointing. Archbishop Desmond Tutu of South Africa has always made the point that one should not underestimate the value of an apology.

Another issue that has given rise to debate is the accountability of non-state actors, particularly trans-national companies, which may be complicit in conflict, or at the very least are shown to benefit financially from conflict. While globalisation has created new opportunities for trans-national corporations to trade anywhere in the world, holding them accountable for violations and obliging them to provide reparations has been difficult. Finding an appropriate forum to deal with these entities has in itself proved to be a major obstacle. Michael Osborne describes the attempt by South African victims to hold multi-nationals accountable under America’s Aliens Tort Claims law as one of the most ambitious attempts to use this legislation to obtain justice. Archbishop Tutu, who supported the claims of the South African victims, argued that ‘the only way to ensure that business will not support and sustain regimes that are responsible for gross human rights violations in the future is to make it known that such conduct will not ultimately be profitable. This, of course, is one larger purpose, as we understand it, of this litigation’. His message was clear: ‘that supporting regimes inflicting gross human rights violations on its people is ultimately unprofitable. We have little doubt that apartheid would not have occurred as it did without the active

and knowing support of certain businesses. The continuation of this litigation comports with this greater purpose of South Africa's post-apartheid era, and by giving voice to those harmed by multinational corporations aiding and abetting apartheid it assists the healing and reconciliation process'.

Another issue raised by du Plessis and Peté is: 'Should there be a time limit which prohibits reparations being claimed for violations, however gross, which took place in the distant past?' They ask an important question: 'Are certain past human rights abuses (such as the Slave Trade) so egregious that they will continue to haunt the present unless they are addressed by some sort of reparation?' In recent years, the depredations of slavery, colonialism and the claims by indigenous peoples to ancestral land have demonstrated the hypocrisy of the powerful when confronted by such claims for reparation. Roy L. Brooks and Diane Sammons illustrate the contradictions and legal problems encountered by such claims. They point out that these claims have often been time barred but that they remain a poignant reminder of the suffering of human beings which should be the subject of reparations.

Finally there is always hope, as is demonstrated by the commitment of the Canadian government to pay more than two million Canadian dollars to First Nation children who were abused while in government controlled residential schools. Ken Cooper-Stephenson documents the road that has been walked by the First Nations of Canada in dealing with this bitter aspect of Canadian history. The historic accord reached on November 20, 2005 between the Government of Canada, the Assembly of First Nations and the Churches on reconciliation and compensation, is a victory for victims all over the world. The position of the Canadian government is in direct contrast to the apparent indifference displayed by other governments to the claims of aboriginal peoples and other abused citizens.

There has to be explicit acknowledgement that the marginalisation and dehumanisation of indigenous peoples, which serves to justify the theft of their land, cannot co-exist with respect for human rights.

It is only by looking its own past directly in the eye, acknowledging failings which have resulted in gross violations of human rights, and addressing injustices which have occurred, that a society is able to move forward. Failure to do so will result in the past returning to haunt the present and the future being rooted in a morass of injustice characterised by disputed national narratives.

'Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses' is an important guide for lawyers, judges, academics, and human rights practitioners as well as for victims and survivors. It provides a theoretical framework as well as a practical guide based on empirical studies, for dealing with a complex issue that straddles legal and moral boundaries.

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